Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

BURKE H. MENDENHALL,

Petitioner,

vs.

STEPHEN GOLDSMITH, THE CITY OF INDIANAPOLIS, INDIANA, AND MARION COUNTY, INDIANA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a prosecutor is shielded by absolute immunity from liability under 42 U.S.C. § 1983, where he:

   a) sought the seizure and forfeiture of an innocent landlord's commercial property, knowing that he lacked probable cause to justify such a seizure;

   b) ordered police to padlock premises housing a bookstore/video store business under a pretrial, *ex parte* RICO seizure order;

   c) again seized and padlocked the same property, relying upon a four-year-old *ex parte* order issued when the landlord's former tenant and RICO co-defendant occupied the building, despite the fact that the property had been leased by a general-audience video store completely uninvolved in the civil RICO case; and

   d) retained the innocent landlord's property for a period of months after this Court held the pretrial RICO seizures unconstitutional in the underlying Indiana cases, until he extracted the landlord's promise never again to lease the property to an adult bookstore.

2) Whether a prosecutor who conceded in oral argument before this Court that the above-described seizures were unconstitutional, and who then retained the property even after this Court held such seizures invalid, is shielded by qualified immunity as a matter of law.

3) Whether a county and municipality should be dismissed in a § 1983 lawsuit, solely on grounds that the

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county prosecutor, elected as a county official but defined by state law as a state employee, could not establish official policy on their behalf.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burke H. Mendenhall[1] prays that this Court issue a writ of certiorari and summarily reverse or review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, in *Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Cir. 1995), is reproduced as Appendix A to this Petition. The unpublished orders of the district court for the Southern District of Indiana appear as Appendix B.

JURISDICTION

The Seventh Circuit Court of Appeals entered its judgment on July 7, 1995. Petitioners have therefore filed this Petition within 90 days of the decision below, in compliance with Rule 13.1 of this Court. Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

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[1] Plaza-Hill Realty Corporation, Inc., was a party to this action below but was dismissed from the appeal because neither it nor Petitioner Mendenhall, its sole shareholder, was represented by counsel in the appeal. In any event, Plaza-Hill has no parent companies or subsidiaries, for purposes of this Court's Rule 29.1. Petitioner Mendenhall is the only other plaintiff in this action; all defendants appear in the caption to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are reproduced as Appendix F:

United States Constitution: amendments I, IV, V, and XIV

United States Code: 42 U.S.C. § 1983

Indiana Code: § 35-45-6-2(1)
§ 34-4-30.5-3

STATEMENT OF THE CASE

Petitioner Burke H. Mendenhall seeks this Court's review of the dismissal of his complaint pursuant to 42 U.S.C. § 1983 against Stephen Goldsmith, the City of Indianapolis, and Marion County, Indiana. This lawsuit derives from what Respondent Goldsmith has admitted to this Court in oral argument of the underlying case to have been the unconstitutional seizures of Petitioner's real property. The Seventh Circuit has held, however, that Goldsmith enjoys absolute immunity, or is protected as a matter of law by qualified immunity.

Formerly a successful Indianapolis real estate developer, Petitioner Mendenhall became caught up in the web of the headline-grabbing crusade against adult bookstores that Goldsmith launched in 1983. Goldsmith, then the Marion County Prosecutor, targeted Mendenhall as a defendant in a civil RICO/obscenity action, solely by virtue of his status as arm's-length landlord to an adult bookstore.

Mendenhall's primary asset at the time was an 8000-square-foot shopping plaza he had constructed in Indianapolis. Earlier in 1983, Mendenhall had leased the major portion of that property to Burton Gorelick, who planned to open an adult bookstore on the premises in

August 1983. Immediately before the bookstore opened for business, however, Goldsmith filed a civil RICO complaint against numerous defendants including Gorelick, but also spuriously naming Mendenhall (whom he knew to be an innocent landlord) as a defendant. Goldsmith premised this complaint on alleged obscenity offenses at Gorelick's two *other* bookstores, with which Mendenhall had no dealings whatsoever.

On the basis of a probable cause affidavit describing materials offered for sale at the other two bookstores, and noting that a third adult bookstore was soon to open on Mendenhall's property, Goldsmith petitioned for the seizure of that property, pursuant to the Civil Remedies for Racketeering Activity (CRRA) statute, Ind. Code § 34-4-30.5-1, *et seq.*, as authorized by § 34-4-30.5-3(b). All the defendants, including Mendenhall and Gorelick's other landlords, were alleged to be conducting a criminal enterprise "through a pattern of racketeering activity," in violation of Indiana's RICO statute, Ind. Code § 35-45-6-1, *et seq.* As to Mendenhall, the complaint alleged no other connection to the alleged "racketeering" – only that he owned the property housing the unopened bookstore.

A *pro-tem* trial judge granted Goldsmith the *ex parte* order on August 1, 1983. Two days later, Goldsmith ordered Indianapolis police to padlock Mendenhall's building and to deny him access to the premises. The never-opened bookstore was padlocked because Goldsmith's seizure petition alleged that it was under "common ownership and control," with the rest of Gorelick's "illegal enterprise," the allegedly illegal purpose of which was "to operate . . . adult bookstores." *See* Complaint, Appendix D at 59. Goldsmith's seizure petition

also asserted that the new bookstore would "probably" distribute obscene materials in the future.

The defendants to this civil RICO action, including Mendenhall by separate counsel, moved to dismiss the complaint and to vacate the seizure order. The trial court denied these motions but certified an interlocutory appeal to the Indiana Court of Appeals, which consolidated the Indianapolis case with a similar RICO/obscenity case from Fort Wayne. The Court of Appeals stayed the seizure in February 1984, some six months after the original padlocking of Mendenhall's property. Mendenhall then regained possession until Goldsmith re-seized and re-padlocked the property in August 1987.

Mendenhall was not a party to the interlocutory appeal raising First Amendment challenges before the Indiana Court of Appeals and Indiana Supreme Court. Instead, because he was confident that his status as an arm's-length landlord entitled him to dismissal as a defendant, Mendenhall repeatedly petitioned the trial court to either dismiss him or allow him to proceed to trial to establish his nonliability. After long delays, however, in August and September, 1984, the trial court summarily denied his motion to dismiss, and his subsequent motion for a separate trial. A few months later, the Indiana Court of Appeals ordered a stay of all trial court proceedings, effectively preventing Mendenhall from extricating himself from Goldsmith's civil RICO action during the protracted appellate litigation.

In June 1985, the Court of Appeals held the Indiana RICO/CRRA provisions unconstitutional as applied to the predicate offense of obscenity, in *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985). Mendenhall then filed this federal lawsuit in July 1985, alleging under § 1983 that Goldsmith had violated his First, Fourth,

Fifth, and Fourteenth Amendment rights. This lawsuit too was stayed pending the continuing appellate litigation in the Indiana courts and eventually in this Court.

In 1987, the Indiana Supreme Court held the RICO/CRRA scheme constitutional in its entirety. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). Elated, Goldsmith boasted to the *Indianapolis Star* on March 3, 1987: "Now we can go into a civil court and without a criminal charge . . . ask a judge to order seizure . . . and we don't even have to prove convictions."

Also in response to this decision, in August 1987, Goldsmith again seized and padlocked Mendenhall's property. He did so under the ostensible authority of the original 1983 *ex parte* seizure order, apparently untroubled by the fact that the order was now four years old and issued on the factual premise that Mendenhall's adult bookstore tenant and co-defendant occupied the building.

During the long period in which the appeals were litigated in the state courts, however, Mendenhall's original tenant and co-defendant, Gorelick, had defaulted on the five-year lease. Mendenhall had therefore leased the premises to a general-audience video store, the Video and Gift Center, which had no relation whatsoever to the RICO/CRRA litigation. Relying on the stale *ex parte* order, Goldsmith would retain possession of Mendenhall's property for most of the next two years.

Thus when Goldsmith re-seized the property, he did so with full notice of the claims asserted in Mendenhall's federal lawsuit, already pending for two years. Moreover, he proceeded to misrepresent the status of this seizure in argument to this Court, and to retain the property long after he had admitted to this Court that the pretrial seizure of the bookstore premises was unconstitutional.

When the *4447 Corporation* case came before this Court, *sub nom. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989),[2] Goldsmith represented the State of Indiana at oral argument, heard on October 3, 1988. (The transcript of Goldsmith's argument is reproduced as Appendix C.) He began with a confusing explanation in response to the Court's query regarding the parties in the consolidated cases, misrepresenting *4447 Corporation* (the Indianapolis case) as "a civil RICO case without pretrial seizures." App. C at 35-36.[3]

Justice O'Connor asked Goldsmith whether the *ex parte* pretrial seizures were constitutional; he answered equivocally that "this is the most difficult position for the state to maintain in this case." App. C at 43. When pressed, he responded that in the Fort Wayne case, the prior obscenity convictions might justify the seizures, but even on that basis, he reiterated that defending the pretrial seizures was "the most difficult position for the state

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[2] Fort Wayne Books, Inc., a bookstore defendant subjected to materially identical *ex parte* pretrial seizures in a case the Indiana courts consolidated with *4447 Corp.*, was the only party to seek review of the Indiana Supreme Court's decision.

[3] Petitioner appreciates the gravity of exposing the Respondent's misfeasance before this Court. Unfortunately, Goldsmith's concessions and misrepresentations to this Court are crucially relevant to the Petitioner's theory that Goldsmith knowingly violated clearly established constitutional rights in ordering the seizure of Petitioner's property and in retaining that property for over two years. At the time of the underlying litigation of *Fort Wayne Books, Inc. v. Indiana*, counsel for the Petitioner in that case were reticent to bring the matter to the Court's attention, confident that they would in any event prevail on the seizure issue. Undersigned counsel, who has been involved in this litigation since 1985, participated in the briefing and oral argument preparation on behalf of Petitioner Fort Wayne Books.

to maintain in this case." *Id.* Goldsmith did not even attempt to justify the seizure of Petitioner Mendenhall's property in the Indianapolis case, which involved no prior obscenity convictions.

The Court continued to press him regarding the constitutionality of pretrial seizures of entire bookstores under this Court's decisions. Goldsmith twice more equivocated that "this is a very difficult position for the state" and suggested that the Indiana RICO law's pretrial seizure provisions were severable from the post-conviction remedies. *Id.* at 44.

Exasperated, the Court finally asked Goldsmith, "Are you just going to leave it up in the air on the pretrial seizures or are you just going to say that it's a difficult question? Are you conceding error?" *Id.* at 47. The Court then asked him specifically about the Indianapolis case. At this point Goldsmith again actively misrepresented his conduct of the Indianapolis litigation. With regard to the Mendenhall property, he said:

> The third store was not open yet and the 72-hour order was that they come into court before they opened up. The object of the Indianapolis pretrial orders was to maintain the status quo until a full adversarial hearing 72 hours later. *I would submit and I would concede that RICO cannot and should not allow ex parte closure of bookstores absent prior convictions. That clearly would be unconstitutional.*

Id. at 47-48 (emphasis added). The Court reiterated: "[Y]ou would say that until the actual case is tried out you cannot seize or close down the business?" *Id.* at 48. "Absolutely not. It would clearly be a violation of their First Amendment rights," Goldsmith responded. At that very moment, of course, Mendenhall's property, leased to

a general-audience video store, was seized and closed under Goldsmith's padlocking order.

Thus Goldsmith expressly conceded that the seizure of the never-opened bookstore he had ordered in Indianapolis was invalid under the rules clearly established by the Court's prior cases. He also blatantly lied about the Indianapolis pretrial orders, which despite the strenuous efforts of expert First Amendment counsel remained in effect until the Indiana Supreme Court stayed the order six months later, and which he had used to repadlock the Mendenhall property for more than a year prior to the argument.[4]

Predictably, this Court agreed with Goldsmith's concessions, and held in its ensuing *Fort Wayne Books* opinion that the wholesale pretrial seizures of expressive businesses were patently unconstitutional under the *Marcus v.*

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[4] Indeed, Goldsmith's argument to this Court is rife with other active prevarications regarding the *Fort Wayne Books* litigation. Justice Stevens asked him directly, "[I]f in a bookstore two obscene books are sold, automatically you can seize the entire inventory? Yes or no?" Goldsmith replied, "I don't agree that that could necessarily happen." App. C at 36-37. Of course, Goldsmith had ordered precisely such a seizure in the Indianapolis case, and the Fort Wayne Books defendants had likewise suffered such seizures. Later, the Court asked Goldsmith, "[W]asn't there a seizure of the entire store before trial?" He answered misleadingly, "In the Fort Wayne case, that's true." *Id.* at 38.

Goldsmith went on to reassure the Court repeatedly that under Indiana's RICO/CRRA statutes, the ultimate forfeiture of an expressive business convicted of two obscenity offenses was not automatic and "wouldn't in any way be mandatory," that "a court would exercise its discretion." *Id.* at 40. In fact, the Indiana statutes patently mandated blanket, automatic forfeitures upon conviction of any "racketeering" offense, and the State was seeking such blanket forfeitures in the underlying cases.

Search Warrant line of decisions. 489 U.S. at 62-67. Because the Court determined that the issues concerning the post-conviction forfeiture and other remedies were then non-justiciable, *id.* at 65 n.11, *Fort Wayne Books* became an unexceptional restatement of the *Marcus* rule. Undismayed by this result, Goldsmith told *The Indianapolis News*, as reported in a front-page story on February 21, 1989: "I told the Court we didn't have the case law to support the pre-trial seizure."

Finally in April 1989, in the wake of this Court's decision, Mendenhall managed to negotiate a settlement dismissing him from the civil RICO proceeding. Only then did Goldsmith return Mendenhall's property, and then only after extracting from Mendenhall the agreement that he would never again lease the property for an "adult use." Mendenhall's complaint alleges that he was required to make that promise as a *quid pro quo* for return of the property. App. D at 64.[5]

In the proceedings below, Goldsmith has never contested the facts as alleged in Mendenhall's complaint, that he sought the seizure order and repeatedly instructed the police to seize Mendenhall's property in flagrant disregard of the landlord's constitutional rights, and extorted a patently unconstitutional concession whereby Mendenhall forfeited First Amendment and property rights. Nonetheless, the courts below have dismissed Mendenhall's civil rights complaint, primarily on grounds

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[5] During Goldsmith's second seizure of the property for 21 months in 1987-89, the premises were so neglected under his administration that the building was rendered all but worthless due to water damage from broken pipes and associated damage. When Mendenhall did recover possession of the formerly valuable property in which he had invested the lion's share of his assets, it was a hollow victory indeed.

that Goldsmith enjoyed absolute immunity. Citing an earlier decision dismissing Goldsmith, the district court held in conclusory fashion that "Goldsmith's alleged involvement in filing a civil forfeiture action under CRRA and RICO, as well as in the locking and relocking of the real estate, was shielded by the doctrine of absolute immunity." App. B at 29.

The trial court also opined that even if Goldsmith's retention of Mendenhall's property after this Court issued its opinion in *Fort Wayne Books* was not shielded by absolute immunity, it was not "clearly established that Mendenhall had a constitutional right to the return of his building on the basis of *Fort Wayne Books*," because the seizure of an entire bookstore premises "only remotely affected the status of protected material, i.e., the books and magazines." App. B at 30. The district court also concluded that Mendenhall's promise not to lease his building to an adult business "was part of a negotiated settlement which resulted in the dismissal of the CRRA action still pending against him," not "in exchange for his regaining possession of the building." *Id.* at 31. (As noted above, Mendenhall's complaint alleges otherwise. App. D at 64.) The district court also dismissed the complaint against the City and County because under Indiana law, the county prosecutor was defined as a state, not a local, official. App. B at 31-32.

After delaying decision on Petitioner's appeal for some 18 months after it was fully briefed, the Seventh Circuit Court of Appeals affirmed, likewise holding that Goldsmith enjoyed absolute immunity "in filing for an injunction, the forfeiture of Mendenhall's property, and the seizure of the property subject to forfeiture." App. A at 13; 59 F.3d at 691. The court also afforded Goldsmith

absolute immunity for the retention of Mendenhall's property until Mendenhall agreed that he never again rent to an "adult use," characterizing that negotiation as the functional equivalent of a plea bargain. *Id.* The court below then conceded that "some of Goldsmith's actions in instructing the Indianapolis police to seize and padlock Mendenhall's building and in the course of retention of the seized property" were "arguably" administrative in nature, but then held that as a matter of law, Goldsmith "was at a minimum protected by qualified immunity." App. A at 14; 59 F.3d at 692. The constitutional rights Goldsmith admitted to this Court that he had violated in the Indianapolis case were held not to have been "clearly established." App. A at 15-16; 59 F.3d at 692.

REASONS FOR GRANTING THE WRIT

As alleged in Mendenhall's complaint, Respondent Goldsmith's conduct mocks the concept of the rule of law; to shield it with the cloak of absolute immunity is to compound the offense. Refusing Petitioner Mendenhall redress for that injury at the hands of an official entrusted with enforcing the law, the decision below contravenes both the letter of this Court's decisions and the policies underlying those decisions and federal civil rights law.

Knowing that Mendenhall's status as a mere landlord created no basis in law or fact for doing so, Goldsmith named him as a RICO defendant and padlocked his property, based purely on conclusory allegations that Mendenhall's arm's-length tenant owned other bookstores where obscenity violations might have occurred. After six months, the Indiana courts ordered him to return the property to Mendenhall. Four years later, however, Goldsmith re-seized the property on the spurious authority of

the original *ex parte* seizure order issued *four years earlier and based on the entirely different factual basis that Mendenhall's premises were occupied by a RICO defendant charged with "racketeering."* This time Goldsmith padlocked the premises for another 21 months after a new, unrelated, general audience video store had leased the property.

Even as applied to the RICO/obscenity defendants, the seizure orders Goldsmith so aggressively sought and executed were transparently unconstitutional, as he would later concede in oral argument before this Court, when it reviewed the tandem RICO/CRRA prosecution in *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989). Yet having admitted that the pretrial, *ex parte* seizures of expressive businesses based on obscenity charges violated the Constitution, Goldsmith continued to hold Mendenhall's property. He still refused to relinquish it even after this Court held that such seizures violated the First Amendment. Goldsmith essentially thumbed his nose at this Court, holding Mendenhall's property hostage until he extorted Mendenhall's promise never again to lease the property to an adult business.

To hold that Goldsmith has absolute immunity is to ignore the nature and function of Goldsmith's conduct in this sordid episode, which went far afield from what this Court has deemed to be core prosecutorial functions "intimately associated with the judicial phase of the criminal process." *See, e.g., Burns v. Reed,* 500 U.S. 478, 486 (1991). The holding below would provide talismanic immunity to prosecutors for actions lacking any safeguards of judicial supervision, and would create unbridled license to destroy innocent citizens' lives as Goldsmith has done here.

To hold further that Goldsmith prevails as a matter of law under the qualified immunity doctrine in these circumstances is entirely to ignore the facts as alleged in Mendenhall's complaint – not only did Mendenhall have a clearly established legal right to be free from such abuses; Goldsmith knew he was violating those rights, and he admitted as much to this Court.

Given this pattern of Goldsmith's intentional abuse of constitutional rights, cloaking him in the undeserved garb of prosecutorial immunity betrays both the public's trust and fundamental federal policies. In doing so, the courts below have improperly put the burden on Mendenhall to refute this powerful and preclusive defense of immunity, rather than requiring that Goldsmith shoulder his rightful burden of demonstrating that absolute immunity should protect him on these egregious facts.

For more than 12 years, Burke Mendenhall has been denied his day in court to vindicate the most basic rights of due process and other fundamental constitutional rights over which Goldsmith has run roughshod. Both to redress this grave injustice and to resolve any of the important legal questions this Court may perceive the need to clarify, this Court's review is urgently warranted.

Because the Seventh Circuit's decision that Mendenhall has stated no claim is so clearly at odds with this Court's recent opinions clarifying the scope of absolute and qualified immunity, Petitioner respectfully requests a summary reversal of the judgment below. Alternatively, if the Court perceives that it should consider this case with full briefing in order to decide, *inter alia*, whether absolute immunity shields prosecutorial conduct in ordering police to padlock property and in retaining that property for purposes of extracting concessions from its innocent owner, then Petitioner urges that the Court issue a writ of

certiorari and reverse the dismissal after full briefing and argument.

I. Affording Goldsmith absolute immunity for his extra-judicial actions in seizing an innocent landlord's property, twice ordering police to padlock the bookstore/video store premises, and wrongfully withholding the property after this Court invalidated the seizure, the decision below contravenes the decisions of this Court, conflicts with decisions of other federal circuits, and dramatically undermines important federal policies.

In this as in several of its previous decisions, the Seventh Circuit has failed to consider the import of this Court's opinions, in which this Court has stipulated that the doctrine of absolute prosecutorial immunity must be applied "quite sparingly" and not in complete derogation of federal civil rights. *Burns v. Reed*, 500 U.S. at 487; *Forrester v. White*, 484 U.S. 219, 224 (1988). "The extension of absolute immunity from damages liabilty," as this Court noted in *Butz v. Economou*, 438 U.S. 478, 505 (1978). threatens to "seriously erode the protection provided by basic constitutional guarantees."

This Court has therefore stressed "[t]he presumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," *Burns*, 500 U.S. at 486-487, and has "refused to extend it any 'further than its justification would warrant.' " *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982).

Unquestionably, "prosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' . . . insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.' " *Burns*, 500 U.S. at 486,

quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976). However, even assuming that, properly applied, the absolute immunity doctrine may shield the exercise of prosecutorial discretion in the context of the underlying civil RICO suit because it was quasi-criminal in nature, *see Butz v. Economou*, 438 U.S. at 515; *Juide v. City of Ann Arbor*, 839 F. Supp. 497, 502 (E.D. Mich. 1993), the courts below have misapplied that doctrine in numerous respects.

The basis for the Seventh Circuit's decision is not entirely clear. The court apparently concludes that Goldsmith has absolute immunity for all the acts Mendenhall alleges as violations of his civil rights, finding it only "arguable" that "Goldsmith's actions in instructing the Indianapolis police to seize and padlock Mendenhall's building and in the course of retention of the seized property may have been administrative in nature." App. A at 14; 59 F.3d at 692.

As the Court of Appeals notes, Mendenhall's allegations extend far beyond Goldsmith's having merely instigated and prosecuted the civil RICO action. Repeatedly, on August 3, 1983, and again on August 1, 1987, Goldsmith ordered the police to seize and padlock Mendenhall's property, necessarily if tacitly misadvising them that the seizure he knew to be unconstitutional was lawful. *See* Complaint, App. D. at 60-61, 63; 59 F.3d at 691. In the latter instance, Goldsmith padlocked the property again four years later on the putative basis of a stale ex parte seizure order issued in entirely different circumstances. He then wrongfully retained the property, even after this Court had held such seizures invalid, and refused to return it until Mendenhall agreed to forfeit his First Amendment and property rights to rent to the adult businesses Goldsmith was seeking to eradicate.

This Court's decisions make clear that Goldsmith cannot hide behind absolute immunity in the face of Mendenhall's allegations. In *Burns v. Reed*, 500 U.S. at 496, this Court reversed the Seventh Circuit to hold that absolute immunity did not apply to claims based on a prosecutor's giving legal advice to police. Two years later in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2611 (1993), this Court again reversed the Seventh Circuit's "unprecedented theory" of absolute immunity for investigatory functions, extending even to the fabrication of evidence.

In this case, Petitioner Mendenhall has alleged conduct outside the scope of the core prosecutorial functions protected by the absolute immunity defense, as these and other decisions of this Court make clear. At a minimum, Goldsmith's orders to the police to padlock the building, his 1987 re-seizure under a four-year-old *ex parte* seizure order, and his retention of the property for over two years, do not fit within this Court's fundamental rationales for absolute prosecutorial immunity.

This Court has stressed that absolute immunity is appropriate only where the prosecutorial actions are subject to judicial oversight and redress. In *Burns*, 500 U.S. at 496, this Court noted:

> [O]ne of the most important checks, the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true if a suspect is not eventually prosecuted. In those circumstances, the prosecutor's action is not subjected to the 'crucible of the judicial process.'

Goldsmith's actions in ordering the police to padlock the Mendenhall bookstore premises, at least the second time,

was not subjected to this crucible, nor was his lengthy retention of the property, ultimately for extortionate purposes. The results of allowing prosecutors such free rein are constitutionally disastrous, as this case shows.

Although the court below has most clearly erred in holding that Goldsmith had immunity for twice ordering the police to padlock Mendenhall's property, and for retaining that property even after the Court's *Fort Wayne Books* decision, this Court may also wish to consider the issue of absolute prosecutorial immunity for the initial decision and preparation to file a civil seizure and forfeiture petition against a party where the prosecutor has no valid legal or factual basis for doing so. This issue has not been resolved by this Court's prior decisions. The Seventh Circuit has now joined one other court, the Third Circuit in *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991), in holding that prosecutors are entitled to absolute immunity for preparing and applying for civil seizure warrants.[6]

As the present case illustrates, there are excellent reasons for treating civil seizure proceedings differently from other criminal and quasi-criminal proceedings. Although not always lacking in the all-important factor of judicial oversight, imposing a civil seizure effectuates a punishment for its duration. Absent exigent circumstances, a seizure is arguably tangential to the prosecutor's core responsibilities. Nor is there much "risk of

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[6] *But see Maxfield v. Thomas*, 557 F. Supp. 1123, 1129 (D. Idaho 1983) (in dicta, concluding that prosecutor would have only qualified immunity for a pre-complaint application for a search warrant); *McSurely v. McClellan*, 697 F.2d 309, 320 (D.C.Cir. 1982) (prosecutor's preparation of search warrant and conduct of search and seizure were investigatory rather than "core prosecutorial functions").

vexatious litigation" – a primary policy behind absolute immunity, *see Burns*, 500 U.S. at 594 – where a plaintiff would have to make a difficult prima facie showing of no probable cause, for example. As to the vaunted "procedural safeguards under the forfeiture laws," upon which the court relied in *Schrob*, 948 F.2d at 1416, the present case vividly illustrates the shortcomings of judicial supervision in practical reality.

Indeed, this court may wish to revisit the entire question of absolute immunity for a prosecutor's filing of such actions without probable cause to do so. There is little justification for such protection where the prosecutor has targeted an innocent citizen, knowing there is no basis for the charges. As Justice Scalia has observed, concurring in *Buckley v. Fitzsimmons*, 113 S.Ct. at 2619, prosecutors who instigate a criminal action – much less a draconian civil seizure and forfeiture proceeding – without probable cause "cannot 'properly be acting as advocates' *before* they have 'probable cause to have anyone arrested.' " *Compare Malley v. Briggs*, 475 U.S. 335 (1986), holding that police do not have absolute immunity for causing plaintiffs' arrest by presenting complaint and affidavit which failed to establish probable cause, *with Burns v. Reed*, 500 U.S. at 495: "[I]t is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. . . . Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know clearly established law, but prosecutors would not." *See also Buckley*, 113 S. Ct. at 2617: "When the functions of prosecutors and detectives are the same, . . . the immunity that protects them is also the same."

In naming Mendenhall as a RICO defendant and seeking the seizure and forfeiture of his property, when he knew he lacked probable cause or any legal basis for doing so, Goldsmith does not deserve the extraordinary protection of absolute immunity, nor does policy require it. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate," as this Court noted in *Burns*, 500 U.S. at 495.

In addition, as the Court of Appeals also notes, Mendenhall has alleged that Goldsmith delayed the return of Mendenhall's property for a substantial period after this Court's decision that the *ex parte* pretrial seizures were unconstitutional, and used his illicit power over the property to extort from Mendenhall a promise never to allow the property to be rented for an "adult use." *Id.* For purposes of Respondents' motion to dismiss, the courts below should have accepted as true Mendenhall's clear allegation that Goldsmith released the property only as a *quid pro quo* for that promise. App. D at 64. Instead, they recharacterized this patently unlawful conduct by Goldsmith as the equivalent of "plea bargaining," and afforded him absolute immunity.

At least with regard to Goldsmith's retention and misuse of the seized property to extort Mendenhall's agreement to forego important constitutional rights, the decision below is in apparent conflict with decisions of both the Third and Tenth Circuits, which have repeatedly held that a prosecutor's management and retention of seized property is not a core prosecutorial function and only warrants qualified immunity. In *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991), the court held that as to the prosecutor's role in the retention, administration, and release of the property, absolute immunity did not shield

the prosecutor from potential liability. As in this case, the *Schrob* court concluded that the seizure was unauthorized from the outset and the property should have been released immediately. The Third Circuit held that absolute immunity did not attach under such circumstances, because the prosecutor's "management of and negotiations concerning return of the property are not directly related to the judicial process. Instead, he was acting in an administrative role." 948 F.2d at 1419, citing *Forrester v. White*, 484 U.S. at 227. *See also Guiffre v. Bissell*, 31 F.3d 1241, 1252-53 (3d Cir. 1994); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983).

The Seventh Circuit has departed from this line of cases, insofar as it held that Goldsmith acted within the scope of his prosecutorial function rather than administratively when he used the property to extort Mendenhall's promise to forego constitutional rights. There thus appears to be a split of authority among the federal circuits on this point, the Third and Tenth Circuits having consistently treated prosecutors' handling of seized property as administrative in nature, while the Eighth Circuit has extended absolute immunity to the prosecutor's decision to retain property, *see, e.g., Thompson v. Walbran*, 990 F.2d 403, 404 (8th Cir. 1993). Meanwhile, the Seventh Circuit strains to characterize Goldsmith's retention of the property as "plea bargain negotiation," deems it only "arguable" that his retention of the property was administrative in nature, and proceeds to find Goldsmith immune from suit as a matter of law.

In this and several other respects, the courts below have failed to assess Mendenhall's complaint under the assumption that its allegations are true. Also ignoring this Court's opinions to the contrary, they have afforded

Goldsmith a generalized presumption that his actions were all prosecutorial functions. That dangerous presumption flouts the basic tenets of this Court's decisions regarding prosecutorial immunity, and was entirely unwarranted as applied to the theories Mendenhall has advanced for Goldsmith's liability in this suit.

As this Court has repeatedly held, the doctrine of absolute immunity is strong medicine which the courts should administer sparingly. As applied by the Seventh Circuit, however, prosecutorial immunity is a doctrine run amok. Under this decision as in previous cases, the Seventh Circuit has empowered the overzealous or rogue prosecutor to commit virtually any atrocity against the flag of absolute prosecutorial immunity.

Once again, the Seventh Circuit's insensitivity to the security of constitutional and other important legal rights requires that this Court reverse a decision disastrously underprotective of those rights. Either summary reversal of this decision dismissing Mendenhall's complaint, or the Court's full consideration of the scope of immunity on these theories, would be appropriate.

II. Given Goldsmith's concession before this Court that seizing Petitioner's property violated well-established constitutional rights, and this Court's numerous decisions to that effect under the First, Fourth, Fifth, and Fourteenth Amendments, the alternative holding below that Goldsmith was shielded by qualified immunity fundamentally contravenes important federal civil rights policy.

The court below concedes that it is "arguable" that "Goldsmith's actions in instructing the Indianapolis police to seize and padlock Mendenhall's building and in the course of retention of the seized property may have been administrative in nature." App. A at 14; 59 F.3d at

692. Appallingly, however, the court has concluded that as a matter of law, Goldsmith is shielded by qualified immunity, because his conduct violated no "clearly established constitutional right." *Id.*[7] Apparently offered as an alternative basis for the court's primary holding that Goldsmith enjoyed absolute immunity, that holding is astonishing in light of Goldsmith's confession to this Court of the unconstitutionality of the seizure he had originally ordered, had re-imposed on extremely dubious legal authority, and continued to administer. It is equally astonishing under this Court's numerous decisions over the past few years, indicating that the seizure was unlawful on a panoply of constitutional and statutory bases.

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[7] The Court of Appeals asserts that Mendenhall waived this qualified immunity issue, but in fact it was briefed by the parties (see App. E at 69-71), and the Court of Appeals decided it. The fact that the issue of qualified immunity was not set out artfully as a separate question presented below reflects the fact that Mendenhall had been bankrupted by the combination of the illegal seizure and the costs of a decade's litigation attending that seizure. He therefore could not afford appellate counsel and was forced to represent himself on appeal. Given these circumstances and the fact that the Seventh Circuit declined to hear oral argument on grounds that "it would not be helpful to the court," 59 F.3d at 685 n.*, a liberal construction of the issues as briefed and decided below is warranted in this case. *See Duran v. Elrod*, 713 F.2d 292, 295 (7th Cir. 1983), citing *Foman v. Davis*, 371 U.S. 178, 181-182 (1962) (under Rule 3(c), appellant's failure to specify all portions of the judgment challenged caused "no prejudice to the appellees as both parties argued the merits of the issues on appeal.") *See also McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984) (*pro se* litigant's "woefully inadequate" brief setting forth a discernible argument not subject to dismissal); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 698-699 (9th Cir. 1988) ("*[P]ro se* pleadings are to be liberally construed, particularly where civil rights claims are involved.").

As this Court has defined the doctrine, qualified immunity shields a prosecutor only where the challenged actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 881. The right asserted to have been clearly established must be one that the law makes "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court has emphasized, however, that qualified immunity does not protect "those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In this case, not only would any reasonable attorney have known that the *ex parte* pretrial seizure of entire bookstore premises was unconstitutional – Goldsmith demonstrably *did in fact know* that his actions violated the Constitution, under an unbroken line of this Court's cases beginning with *Marcus v. Search Warrant*, 367 U.S. 717 (1961). He repeatedly conceded as much in oral argument before this Court.

The only possible explanation for Goldsmith's concession was that the Indiana Supreme Court's decision was so patently at odds with this Court's decisions that the State could not afford to lose credibility by attempting to defend it. As a matter of strategy, Goldsmith obviously decided to concede the pretrial seizure provisions in an effort to salvage a holding that the other contested RICO/CRRA provisions were constitutional. And indeed, this Court treated its decision of the issue as a foregone conclusion under *Marcus* and its progeny.

The courts below have held, however, that Mendenhall's right to be secure from such a seizure was not clearly established, even in light of *Fort Wayne Books*. This

Court unequivocally held in that case that the very seizures challenged here, the wholesale seizures of expressive retail stores and their wares, were unconstitutional. The Court unanimously treated the case as an unexceptional restatement of the *Marcus* rule.

Although the Court did limit its holding to the seizure of "expressive property," 489 U.S. at 67 n.12, it is ludicrous to assert that Goldsmith's seizing the entire unopened bookstore and later the uninvolved video store, padlocking both the expressive materials and the retail premises necessary to their dissemination, "only remotely affected the books and magazines within it and the building could arguably have been considered non-expressive property." App. A at 15-16; 59 F.2d at 692. In the first instance, Mendenhall's property was padlocked as the very means of imprisoning the expressive materials Goldsmith sought to censor. The second seizure, lacking even that gossamer pretext, closed down a general-audience video store. Mendenhall's Fourth, Fifth and Fourteenth Amendment rights intersected with his tenants' more direct First Amendment rights, all of which impelled Goldsmith to concede that the seizures were unconstitutional.

In addition, Mendenhall's own First Amendment rights were implicated by Goldsmith's entire course of conduct. The courts below also fallaciously reasoned that Mendenhall did not have standing to assert the First Amendment rights upon which this Court based its decision in *Fort Wayne Books*. But Goldsmith assailed his right as a landlord to lease his property to an expressive business, beginning with the spurious allegation that doing so exposed him to liability as a "racketeer" based on his tenant's possible obscenity violations, then by padlocking his property on this basis, and finally when he demanded

that Mendenhall relinquish that right in exchange for the return of the property. In short, Mendenhall's First Amendment rights were bound up with those of his tenants throughout this litigation.

Moreover, even if Mendenhall's constitutional right to be free from this seizure were conceptually severable from his tenant's First Amendment rights, it was clearly established on numerous other grounds. This Court's recent decisions, in which it has unfortunately been required to correct a number of such abuses, have treated such unlawful seizures as rudimentary questions under longstanding due process and Fourth Amendment principles.

In *Soldal v. Cook County, Illinois*, ___ U.S. ___, 113 S. Ct. 538 (1992), for example, this Court held that the county was potentially liable under § 1983 where its deputy sheriffs had refused to prevent what they knew to be the unlawful seizure of the plaintiff's mobile home. In *Soldal*, yet another of its recent § 1983 decisions requiring this Court's reversal, the Seventh Circuit had "recognized that there had been a seizure, but concluded that it was a seizure only in a 'technical' sense, not within the meaning of the Fourth Amendment." 113 S. Ct. at 543. With more than a trace of annoyance, this Court unanimously reversed this "novel holding," noting that its prior cases "unmistakeably" held that the Fourth Amendment protects property from illegal seizures. *Id.* at 544. "We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." *Id.* at 543.

Under numerous other recent decisions, Mendenhall's rights were violated by Goldsmith's padlocking and retaining the property. In *United States v. James Daniel*

Good Real Property, ___ U.S. ___, 114 S. Ct. 492, 497 (1992), for example, this Court held that "due process prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." This was hardly a novel proposition, and the Court treated the question presented by Mendenhall's case as a rudimentary matter of due process. In the various opinions in the case, not one Justice indicated that due process would allow the *ex parte* seizure of property belonging to one never convicted of a crime.

Also, in *Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163 (1993), this Court held that as a statutory matter, liability under the materially identical language of the federal RICO Act, 18 U.S.C. § 1962(c), extends only to those who participate in the operation or management of the criminal enterprise. Again, this holding is hardly surprising, and would clearly govern the Indiana statute as well. Not one Justice would have interpreted the statute as extending liability to parties whose only alleged relationship to the "racketeering enterprise" was that of mere landlord, as Goldsmith so liberally interpreted the Indiana statute. *Reves* merely highlights the obvious conclusion that Goldsmith violated Mendenhall's legal rights when he targeted him as an innocent, arm's-length landlord for the grim seizure and forfeiture sanctions of Indiana's RICO/CRRA statutes.

The court below dismissed these cases as irrelevant because they were decided after Goldsmith undertook the course of conduct he has acknowledged to be unconstitutional, even though in the same breath the court characterized *Soldal* as "reaffirming" basic Fourth Amendment principles. In fact, all of these recent cases are grounded

in the most elementary principles of statutory construction and constitutional rights. Any reasonable attorney in Goldsmith's position would have known he was violating Mendenhall's First, Fourth, Fifth, and Fourteenth Amendment rights, and Goldsmith did in fact knowingly violate those rights.

On this alternative holding as well, the decision below should be summarily reversed. Otherwise, the Court may wish to review this case in order to clarify that merely because one of its decisions later affirms a constitutional right which would have been clear to any reasonable person, does not signify that the right was not "clearly established" in the first instance.

III. As Prosecuting Attorney for Marion County, Goldsmith established official policy for the municipal and county Respondents, and their potential liability is unaffected by his status as a state employee under state law.

Finally, the courts below concluded as a matter of law "that Mendenhall had stated no § 1983 claim against the city or county," because "an Indiana county prosecutor is a state officer and not a policy maker for the city or county." App. A. at 2; 59 F.2d at 687 n.2.[8] This conclusion

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[8] The Court of Appeals treated this issue as waived, asserting that "Mendenhall's brief does not attack that holding." *Id.* In fact, Mendenhall's brief expressly argues the issue of the City and County's liability, at pp. 22-24, see App. E at 71-75, and Respondents briefed the issue as well. As noted above, the unlawful seizure of which Mendenhall complains here, and the decade of litigation that ensued, so ruined him financially that he could not afford appellate counsel and therefore briefed the case *pro se*. In light of these circumstances, the court below might have been more forebearing of technical unartfulness in a

is both an argumentative denial of Mendenhall's allegations, see App. D at 56, 60-61, and a *non sequitur*: even if county prosecutors are technically defined as state employees under Indiana law, they still function as important policy-making officials in the counties where they serve as the chief law enforcement executives. Indeed, the Indiana Supreme Court has recognized as much in at least one decision acknowledging public policies established by county prosecutors.

The question whether a county prosecutor has established official policy must be considered in context, and under the functional approach this Court has applied to other similar questions regarding liability under § 1983. Otherwise, under the approach of the courts below, technicalities of state law regarding the employment of important policy-making officials could artificially preclude liability.

As this Court first held in *Monell v. New York Department of Social Services*, 436 U.S. 658, 691 (1978), municipalities may be held liable under § 1983 if a "municipal policy or custom caused the constitutional injury." *See also Leatherman v. Tarrant County*, 113 S. Ct. 1160, 1162 (1993). In appropriate circumstances, municipalities may be liable for § 1983 violations based on a single decision by their official policy-makers. This court has taken a practical, functional approach to that inquiry: "If the decision to adopt that particular course of action is properly made by that government's authorized decision-

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generally lucid briefing debut by a layperson forced to proceed *pro se* in a civil rights action. (*See* fn. 7, *supra*, and caselaw cited therein.) Given that context, Petitioner asks this Court to treat the fully briefed issue as preserved on this record, and the Seventh Circuit's opinion as simply affirming the trial court.

makers, it surely represents an act of official government 'policy' as that term is commonly understood." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).

Mendenhall's complaint amply alleges that Goldsmith established City/County policy for purposes of *Monell* liability, a factual allegation which must be taken as true. *See* App. D. at 56, 60-61; *Leatherman*, 113 S. Ct. at 1161. This allegation comports entirely with Goldsmith's position as an important elected official and policy-maker for the governmental Respondents. As Prosecuting Attorney for Marion County, Goldsmith served as chief law enforcement executive for the unified government of the City of Indianapolis and Marion County. In that capacity, he targeted Mendenhall and his civil RICO co-defendants as part of the public policy he had established on behalf of those Respondents – a declared and undeclared war against adult bookstores in Indianapolis. In conducting this crusade against adult bookstores, Goldsmith was establishing public policy of the first magnitude. The municipal/county Respondents should not be allowed to hide behind irrelevant technicalities of state law to deny liability for the unconstitutional acts of their authorized decision-maker.[9]

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[9] In addition to a common-sense functional analysis of Goldsmith's policy-making role, the Indiana courts have held that Indiana county prosecutors do indeed set official policies for local government. In a case of precisely the vintage of Goldsmith's challenged conduct, *In the Matter of Carmany*, 466 N.E.2d 16, 18-19 (1984), the Indiana Supreme Court recognized that county prosecutors set policy for law enforcement in their localities.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to summarily reverse the decision of the Seventh Circuit in dismissing the complaint. Alternatively, Petitioner requests that the Court grant a writ of certiorari, and reverse and remand after full briefing and argument of these issues.

Respectfully submitted,

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APPENDIX A

Mendenhall v. Goldsmith, 59 F.3d 685 (7th Cir. 1995)

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2715

BURKE H. MENDENHALL and PLAZA-HILL REALTY CORPORATION,

Plaintiffs-Appellants,

v.

STEVEN GOLDSMITH, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 85-C-985 – S. Hugh Dillin, *Judge.*

SUBMITTED APRIL 21, 1995* – DECIDED JULY 7, 1995

Before POSNER, *Chief Judge,* and FAIRCHILD and KANNE, *Circuit Judges.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement has been filed, so the appeal is submitted on the briefs and record.

FAIRCHILD, *Circuit Judge.*

Burke H. Mendenhall appeals from the dismissal of his civil rights action brought under 42 U.S.C. § 1983 against Steven Goldsmith, former Prosecuting Attorney for the Nineteenth Judicial Circuit of the State of Indiana; the City of Indianapolis, Indiana; and, Marion County, Indiana.[1] Count One of the complaint alleged that Mendenhall's constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments were violated when Goldsmith instituted seizure and civil forfeiture proceedings under Indiana law, resulting in the padlocking of Mendenhall's building that housed an adult bookstore. Count Two alleged a pendent claim of inverse condemnation against the City and County. The district court held that Goldsmith was immune from civil liability, and that no § 1983 cause of action was stated against the City or the County.[2] The pendent claim was dismissed without prejudice. We affirm.

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[1] Mendenhall appears *pro se*, and is not a lawyer. A corporation can appear only by counsel. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147 (1986). Plaza Hill Realty Corporation has not appeared by counsel, and its appeal is dismissed.

[2] The district court decided that Mendenhall had stated no § 1983 claim against the city or county, holding as a matter of law that an Indiana county prosecutor is a state officer and not a policy maker for the city or county. Mendenhall's brief does not attack that holding. Neither does he challenge the district court's holding that he stated no claim under § 1985. He has forfeited these points. *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990).

I. FACTUAL BACKGROUND

Burke H. Mendenhall owned a commercial building located at 4266[3] West 38th Street in Indianapolis, Indiana.[4] On June 1, 1983, a portion of the building was leased to Burton Gorelick, d/b/a Plaza Entertainment Center, for a five-year, renewable term. Gorelick obtained possession on June 11, and was set to open an adult bookstore on the premises when, on August 1, prosecutor Stephen Goldsmith filed in the Circuit Court of Marion County, Indiana, a civil complaint for injunctive relief against 4447 Corporation and other corporate and individual defendants, including Mendenhall.[5] The complaint in *Goldsmith v. 4447 Corporation, et al.*, alleged that the defendants had conducted an enterprise through a pattern of racketeering activity through the distribution of obscene books and films at three adult bookstores in violation of Indiana's Racketeer Influenced and Corrupt Organizations Act (RICO), Ind.Code §§ 35-45-6-1, *et seq.* The complaint was brought pursuant to Indiana's Civil Remedies for Racketeering Activity (CRRA) statute, Ind.Code §§ 34-4-30.5-1, *et seq.*, and sought forfeiture of all real and personal property "used in the course of, intended for use in the course of, derived from, or realized through" the defendants' racketeering activity. Ind.Code § 34-4-30.5-3(a). Goldsmith also filed a separate

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[3] Numerous pleadings erroneously designated the number 4276 as the address of Mendenhall's building.

[4] Title to the building was transferred from Mendenhall to Plaza-Hill Realty Corporation on March 15, 1984.

[5] On September 8, 1983, venue in the case was transferred to the Circuit Court of Hamilton County, Indiana.

petition for seizure of the property subject to forfeiture. Ind.Code § 34-4-30.5-3(b). The seizure petition was supported by a probable cause affidavit executed by a detective of the Indianapolis Police Department describing the books and films available for sale at two of the bookstores that he believed to be obscene. The affidavit stated that another detective described a third bookstore yet to open on Mendenhall's property, and that this bookstore was also part of the defendants' racketeering activity. After hearing testimony in support of the petition, the trial judge entered an *ex parte* order finding that there was probable cause to believe that the two existing adult bookstores violated Indiana law, and directing the Indianapolis Police Department to "lock, seal and secure" the bookstore on Mendenhall's property in advance of its opening, as authorized by Indiana Code § 34-4-30.5-4.

On August 3, 1983, at Goldsmith's direction and pursuant to the seizure order, Indianapolis police officers locked Mendenhall's building and denied him access to it. The defendants next moved to dismiss the complaint and to vacate the seizure order on the ground that the RICO and CRRA statutes violated their First and Fourteenth Amendment rights. The trial court denied the motions but certified its ruling for an interlocutory appeal to the Indiana Court of Appeals. Mendenhall was not a party to the appeal in *4447 Corporation v. Goldsmith*, which was consolidated with that in *Fort Wayne Books, Inc. v. Indiana*, a case arising in the Circuit Court of Allen County, Indiana, and raising the same constitutional issue.

On June 12, 1985, the Indiana Court of Appeals ruled that the RICO/CRRA statutory scheme violated the First

Amendment in that its injunctive remedies operated as a prior restraint in its application to the predicate offense of obscenity. *4447 Corp. v. Goldsmith,* 479 N.E.2d 578 (Ind. Ct. App. 1985). Mendenhall regained possession of his building.

On March 2, 1987, the Indiana Supreme Court granted a motion to transfer and vacate, upholding the constitutionality of the RICO and CRRA statutes and the pre-trial seizure of the bookstores' contents. *4447 Corp. v. Goldsmith,* 504 N.E.2d 559 (Ind.1987). Following this ruling, on August 1, 1987, Goldsmith directed the police to again seize and padlock Mendenhall's building pursuant to the original seizure order. *Certiorari* was granted by the U.S. Supreme Court in *Fort Wayne Books, Inc. v. Indiana,* as well as *State v. Sappenfield,* 505 N.E.2d 504 (Ind. Ct. App. 1987), with which it was consolidated. *Fort Wayne Books, Inc. v. Indiana,* 485 U.S. 933 (1988). *4447 Corporation* did not apply for *certiorari* and took no part in the Supreme Court proceedings. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 52 n.3 (1989).

On February 21, 1989, the U.S. Supreme Court decided that Indiana's RICO/CRRA statutory scheme was not unconstitutional for its use of obscenity as a predicate offense, but that the pre-trial seizure of expressive material contained in the bookstores was unconstitutional as a prior restraint on expression in violation of the First Amendment. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989).

In April, 1989, Mendenhall reached a settlement agreement in the state court litigation. The prosecution agreed to dismiss the CRRA action still pending against

Mendenhall in exchange for his promise not to use his property for an "adult use." Control of the building was returned to Mendenhall.

The instant federal action, which was filed by Mendenhall in July, 1985, was stayed pending the outcome of the litigation in the Indiana courts and U.S. Supreme Court. Once the U.S. Supreme Court announced its decision, the stay was lifted, and subsequently the case was dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

II. DISCUSSION

A. Appellate Jurisdiction

As an initial matter, we must inquire into our jurisdiction to consider this appeal. The original judgment of the district court entered on March 5, 1993, stated that "the plaintiffs take nothing by their complaint." The judgment made no separate mention of Count Two, the pendent claim against the City and the County. Within ten days, on March 14, 1993, Mendenhall filed a motion under Fed. R. Civ. P. 59(e) seeking to amend the judgment by stating that the pendent claim was dismissed without prejudice. The district court entered an amended judgment on June 15, 1993, granting the motion and dismissing Count Two without prejudice. Mendenhall filed a notice of appeal on July 13, 1993, which was within thirty days of the amended judgment but not the original one.

Our rule is that any post-judgment substantive motion that is made within ten days of the judgment is deemed a Rule 59(e) motion. *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1065 (7th Cir. 1992). The

rule was designed to diminish disputes over appealability arising from the fact that a Rule 59(e) motion postponed the time for filing an appeal from the judgment sought to be altered or amended while a motion under Rule 60 did not. *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993); *see* Fed. R. App. P. 4(a)(4) (1991) (amended 1993).[6] The district court's judgment in this case was clearly on the merits, and Mendenhall's motion may be properly considered as a Rule 59(e) motion, despite the appellees' characterization of the motion as one to correct a mere clerical error, because the motion sought a substantive change in the original judgment. *Maxus Energy Corp. and Subsidiaries v. United States*, 31 F.3d 1135, 1139-41 (Fed. Cir. 1994); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1131-32 (11th Cir. 1994); *see Bank of California, N.A. v. Arthur Andersen & Co.*, 709 F.2d 1174, 1176-77 (7th Cir. 1983). Having been served within ten days of the amended judgment, the motion postponed the appeals period. Because Mendenhall filed his appeal within thirty days of the amended judgment, we have jurisdiction to review the original judgment as well as the change.

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[6] A December 1, 1993, amendment to Rule 4(a)(4) provides that a Rule 60 motion served within ten days of the entry of a judgment postpones the time for filing a notice of appeal. Fed. R. App. P. 4(a)(4)(F). Because we conclude that the appeal was timely under the 1991 version of Rule 4(a)(4), we need not decide whether the 1993 amendment would apply retroactively.

B. Prosecutorial Immunity

Prosecutors may be entitled to either absolute or qualified immunity from civil liability under 42 U.S.C. § 1983 for actions undertaken pursuant to their official duties. Absolute immunity covers prosecutorial functions such as the initiation and the pursuit of a criminal prosecution, the presentation of the state's case at trial, and other conduct that is "intimately associated" with the judicial process. *Buckley v. Fitzsimmons,* 113 S. Ct. 2606, 2613-14 (1993); *Imbler v. Pachtman,* 424 U.S. 409, 430, 431 n.33 (1976). By contrast, a prosecutor has only the protection of qualified immunity when functioning in the role of an administrator or investigative officer rather than an advocate. *Buckley,* 113 S. Ct. at 2616. *Burns v. Reed,* 500 U.S. 478, 495 (1991); *Imbler,* 424 U.S. at 431 n.33. Giving legal advice to the police is deemed to be administrative in character. *Buckley,* 113 S. Ct. at 2614-15; *Burns,* 500 U.S. at 495. A functional approach is used to determine the appropriate level of immunity. *Buckley,* 113 S. Ct. at 2613; *Burns,* 500 U.S. at 486.

In the case before us, the prosecutor had brought a civil proceeding. Appellant seems to argue that in suing civilly, a prosecutor is not protected at all by absolute immunity. In *Butz v. Economou,* 438 U.S. 478 (1978), however, the U.S. Supreme Court analogized government administrative proceedings to criminal prosecutions and held that a Department of Agriculture attorney who initiated and pursued an enforcement proceeding to revoke the registration of a commodity futures commission merchant performed functions analogous to those of a prosecutor, and therefore was entitled to absolute immunity in a damages action brought under *Bivens v. Six Unknown*

Named Agents, 403 U.S. 388 (1971).[7] *Butz*, 438 U.S. at 512-17. The Court explained:

> We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. . . .
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding, there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort

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[7] For purposes of the immunity analysis, federal officials are indistinguishable from state officials and receive no greater degree of protection from constitutional claims. *Butz*, 438 U.S. at 500-01, 504; *Walrath v. United States*, 35 F.3d 277, 281 n.1 (7th Cir. 1994).

> to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack."
>
> The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review.
>
> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

Id. at 515-16 (citations and footnote excluded).

Under the guidance of *Butz*, the Third Circuit, in *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991), rejected an argument similar to Mendenhall's and extended absolute immunity to the conduct of a prosecutor in a civil

forfeiture action.[8] In *Schrob*, the plaintiffs filed a *Bivens* action in which they claimed that their company had been illegally seized after the prosecutor filed an *in rem* civil action seeking forfeiture of the company's stock and other property pursuant to the civil forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 881(a)(6), (7). The court noted that "absolute immunity is extended to officials when their duties are functionally analogous to those of a prosecutor's, regardless of whether those duties are performed in the course of a civil or criminal action." *Schrob*, 948 F.2d at 1411.

The court divided the instances of the allegedly improper prosecutorial conduct into four activities: "(1) [the] creation and filing of the *in rem* complaint; (2) preparation of and application for the seizure warrant; (3) participation in the *ex parte* hearing for the issuance of the seizure warrant; and (4) actions surrounding the seizure, retention and release of [plaintiffs'] property." *Id.* at 1409. It determined that absolute immunity shielded all acts save the retention and release of the subject property, which apparently included management functions, and were deemed to be administrative in nature. *Id.* at 1411, 1419. The court reasoned that these activities were sufficiently related to the judicial process to warrant the blanket protection afforded by absolute immunity. *Id.* at

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[8] *See also, e.g., Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988) (civil rights); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986) (civil contempt); *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986) (negligence); *Russell v. Millsap*, 781 F.2d 381 (5th Cir. 1985) (permanent injunction), *cert. denied*, 479 U.S. 826 (1986).

1411-12, 1416-17. In addition, the plaintiffs had adequate means under the forfeiture laws to challenge improper conduct by the prosecutor. *Id.* at 1412-13. The court noted that in this context there should be no distinction between a prosecutor acting as the government's advocate in a criminal or civil proceeding. *Id.* at 1412.

Thus, that the alleged misconduct here arose in the context of a civil proceeding with a law enforcement purpose[9] does not render absolute immunity inappropriate. *Butz,* 438 U.S. at 515; *Schrob,* 943 F.2d at 1411-12; *Juide v. City of Ann Arbor,* 839 F. Supp. 497, 502 (E.D.Mich.1993). The essential inquiry is whether Goldsmith was functioning in an enforcement role analogous to that of a prosecutor. *Buckley,* 113 S. Ct. at 2615; *Burns,* 500 U.S. at 490; *Butz,* 438 U.S. at 515; *Imbler,* 424 U.S. at 431 n.33. If so, he was entitled to absolute immunity.

With these principles in mind, we examine the allegations made against Goldsmith. Mendenhall maintained that Goldsmith violated his constitutional rights by: (1) bringing a civil RICO complaint against him and his corporation; (2) seeking a seizure order from the Indiana trial court on August 1, 1983; (3) advising the police to execute the seizure order and close Mendenhall's building on August 3, 1983; (4) advising the police to reseal the building on August 1, 1987; and (5) delaying the return of

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[9] Indiana's CRRA and RICO statutes were patterned after the federal anti-racketeering laws. *See Alvers v. State,* 489 N.E.2d 83, 87 (Ind. Ct. App. 1986). The federal RICO statute was designed "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 464 U.S. 16, 26 (1983).

the property in order to obtain his promise not to permit the property to be used for an "adult use."

We conclude that absolute immunity attached to Goldsmith's conduct in filing for an injunction, the forfeiture of Mendenhall's property, and the seizure of the property subject to forfeiture. Goldsmith acted pursuant to the authority vested in him under Indiana law, functioning purely in his capacity as an advocate for the state. *See Butz*, 438 U.S. at 515; *Imbler*, 424 U.S. at 427-29; *Schrob*, 948 F.2d at 1412-13, 1416; *Juide*, 839 F. Supp. at 502-03.

We also think that Goldsmith was absolutely immune for his negotiation of a settlement with Mendenhall. Goldsmith's efforts in this regard were analogous to similar functions of a prosecutor. While not technically a plea bargain, which merits the protection of absolute immunity, *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981); *see Santobello v. New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice."), the agreement struck by Goldsmith to dismiss the CRRA action still pending against Mendenhall in exchange for Mendenhall's promise not to use his property for an "adult use" was sufficiently similar to warrant the same level of immunity.[10] Accordingly, this allegation was also properly dismissed.

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[10] *See also, e.g., Arnold v. McClain*, 926 F.2d 963, 967 (10th Cir. 1991) (prosecutor's action in securing employee's resignation in exchange for promise not to file perjury charge was sufficiently similar to plea bargaining to warrant absolute immunity); *Schloss v. Bouse*, 876 F.2d 287, 291-92 (2d Cir. 1989) (prosecutor's action in negotiating a release from civil liability

While it may be arguable that some of Goldsmith's actions in instructing the Indianapolis police to seize and padlock Mendenhall's building and in the course of retention of the seized property may have been administrative in nature, *see Buckley*, 113 S. Ct. at 2615; *Burns*, 500 U.S. at 492-95; *Schrob*, 948 F.2d at 1419,[11] so that absolute immunity would not apply, Goldsmith was at a minimum protected by qualified immunity.

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in exchange for dropping criminal charges was entitled to absolute immunity); *Powers v. Coe*, 728 F.2d 97, 103-04 (2d Cir. 1984) (prosecutor's action in allegedly breaching promise not to prosecute was covered by absolute immunity); *compare, e.g., Schrob*, 948 F.2d at 1419 (absolute immunity did not apply to prosecutor's negotiation of a personal release of liability in connection with the seizure of property under 21 U.S.C. § 881(a)(6) where the seizure was unauthorized from the outset and the property should have been released immediately).

[11] *See also, e.g., Giuffre v. Bissell*, 31 F.3d 1241, 1252-53 (3d Cir. 1994) (prosecutor's action in an allegedly improper sale of forfeited property clearly involved administrative duties and therefore was not covered by absolute immunity); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985) (prosecutor's action in managing the post-trial disposition of seized property that was not used as evidence and that the state did not intend to keep was not covered by absolute immunity), *cert. denied*, 474 U.S. 1101 (1986); *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983) (prosecutor's action in assisting with the unlawful sale of seized property not covered by absolute immunity); *Coleman v. Turpen*, 697 F.2d 1341, 1346 (10th Cir. 1982) (prosecutor's participation in illegal sale of seized property was not entitled to absolute immunity); *compare, e.g., Thompson v. Walbran*, 990 F.2d 403, 404 (8th Cir. 1993) (prosecutor's action in retaining defendant's property that would be needed at trial if the defendant succeeded in overturning his conviction was covered by absolute immunity).

Qualified immunity shields a local official from civil liability for damages insofar as his behavior does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A clearly established right is one which is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

At the time of the complained-of conduct, it had not been established that any aspect of Indiana's CRRA statute was unconstitutional. Lack of clarity on the point was evidenced by the conflicting decisions of the Indiana state court cited earlier and the dissenting opinions in those cases. The only constitutional right established in *Fort Wayne Books* was a First Amendment right not to have expressive materials seized until there has been a determination of obscenity after an adversary hearing. *Fort Wayne Books, Inc.*, 489 U.S. at 62-63. The opinion of the Court explicitly stated that it did not address the pre-trial seizure of non-expressive property, nor did it reach any due process question that might be involved. *Id.* at 63 n.9, 67 n.12. Thus, Goldsmith did not violate any clearly established constitutional right in advising the police to seize and padlock Mendenhall's building on two occasions. He did wait until two months after the decision in *Fort Wayne Books, Inc.* was announced to release the property. On this point, Judge Dillin noted that because there was no on-going business when the building was seized, the seizure only remotely affected the books and magazines within it and the building could arguably have been considered non-expressive property. He concluded that

Fort Wayne Books, Inc. did not clearly establish a constitutional right to the return of the building. Again, Mendenhall has failed to challenge this ruling as erroneous.[12]

AFFIRMED.

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[12] *Soldal v. Cook County, Ill.*, 113 S. Ct. 538, 547 (1992), reaffirming "that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place" was decided December 8, 1992. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 497 (1993), holding that "the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard," was decided December 13, 1993. Both were decided after Goldsmith's pertinent conduct in this case.

APPENDIX B

Mendenhall v. Goldsmith, unpublished orders of the District Court for the Southern District of Indiana.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BURKE H. MENDENHALL, and PLAZA-HILL REALTY CORPORATION	)	
Plaintiffs,	)	**IP 85-985C**
vs.	)	
STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit of Indiana CITY OF INDIANAPOLIS, INDIANA and MARION COUNTY, INDIANA	)	
Defendants.	)	

AMENDED JUDGMENT

The Court having considered Plaintiff Motion to Amended Judgment, which motion reads as follows:

(H. I.)

Hereby grants said Motion and the May 4, 1993 Judgment is amended to read as follows:

IT IS THEREFORE CONSIDERED AND ADJUDGED that the plaintiffs take nothing by Count one of their complaint and that the Court elects not to continue to exercise pendant jurisdiction over the state cause of action set forth in Count two and Count two is hereby dismissed without prejudice.

IT IS FURTHER ADJUDGED that the plaintiffs pay the costs of this action.

Dated this 14 day of June, 1993.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BURKE H. MENDENHALL, and PLAZA-HILL REALTY CORPORATION, Plaintiffs, -vs- STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit of Indiana, CITY OF INDIANAPOLIS, INDIANA, and MARION COUNTY, INDIANA, Defendants.	)	NO. IP 85-985-C

JUDGMENT

The Court having this day entered its ruling on the merits, granting the motions to dismiss filed in the above action, which entry reads as follows: (H. I.)

IT IS THEREFORE CONSIDERED AND ADJUDGED that the plaintiffs take nothing by their complaint.

IT IS FURTHER ADJUDGED that the plaintiffs pay the costs of this action.

Dated this 4th day of May, 1993.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BURKE H. MENDENHALL, and PLAZA-HILL REALTY CORPORATION,	)	
Plaintiffs,	)	NO. IP 85-985-C
-vs-	)	
STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit of Indiana, CITY OF INDIANAPOLIS, INDIANA, and MARION COUNTY, INDIANA,	)	
Defendants.	)	

ENTRY

This cause comes before the Court on defendant Stephen Goldsmith's motion to dismiss, defendant City of Indianapolis' motion to dismiss, plaintiffs' motion to reinstate Stephen Goldsmith as a party defendant, and on plaintiffs' motion to amend the second amended complaint by interlineation. For the following reasons, all of the motions are granted.

Background

At all times relevant, plaintiff Burke H. Mendenhall was personally, or through plaintiff Plaza-Hill Realty Corporation (Plaza-Hill), the owner of a commercial building

located in Indianapolis, Indiana.[1] On June 1, 1983, this real estate was leased to Burton Gorelick d/b/a Plaza Entertainment Center for a five-year, renewable term. Gorelick took possession of Mendenhall's property on June 11, 1983 and prepared to open an adult bookstore there in August of 1983.

Certain statutes relevant to this case were in force in Indiana in 1983. Indiana Code 35-49-3-1 makes it a misdemeanor to offer to distribute or distribute obscene matter to another person. Indiana Code 35-45-6-2 (the Indiana "RICO" statute) provides as follows:

> (a) A person:
>
> (1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in

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[1] On March 15, 1984, title to Mendenhall's real estate, including the 8,000 square foot building, was transferred from Mendenhall to Plaza-Hill. Mendenhall is Plaza-Hill's sole stockholder and for such reason the two plaintiffs may occasionally be referred to simply as "Mendenhall."

> the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

According to I.C. 35-45-6-1, the definitions section of the RICO statute, "enterprise" may be a sole proprietorship, corporation, or other legal entity. "Pattern of racketeering activity" means "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, . . . or method of commission. . . . "Racketeering activity" means "to commit . . . or aiding and abetting in a violation . . . of IC 35-49-3 [the obscenity statute]. . . . "

The RICO statute has a civil analogue, the Civil Remedies for Racketeering Activity Act (CRRA), I.C. 34-4-30.5-1, et seq. This statute provides, among other things, that the prosecuting attorney may bring an action to enjoin a violation of I.C. 35-45-6-2 (I.C. 34-4-30.5-2) and may also bring an action for the forfeiture of property intended for use in conduct in violation of I.C. 35-45-6-2 (I.C. 34-4-30.5-3). Indiana Code 34-4-30.5-3 reads as follows:

> (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through,

> conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. . . .
>
> (b) When an action is filed under subsection (a), the prosectuor [sic] may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

On August 1, 1983, defendant Goldsmith, as Prosecuting Attorney for the 19th Judicial Circuit, and pursuant to I.C. 34-4-30.5-2, filed in Marion Circuit Court a civil complaint for injunctive relief against 4447 Corporation and 20 others, including Gorelick and Mendenhall. The complaint alleged that the various defendants had engaged in a pattern of racketeering activity in violation of the RICO statute. The alleged racketeering activity involved the distribution of obscene books and films in violation of I.C. 35-49-3-1 at two bookstores, and that such activity was about to commence on Mendenhall property.

Additionally, the complaint sought relief in the form of the forfeiture of all real and personal property "used in the course of, intended for use in the course of, derived from, or realized through" the defendants' racketeering activity, pursuant to the Civil Remedies for Racketeering Activity Act (CRRA), I.C. 34-4-30.5-3(a). Also on August 1, 1983, Goldsmith filed, pursuant to I.C. 34-4-30.5-3(b), a

petition for seizure of the property subject to forfeiture. The seizure petition was supported by a probable cause affidavit executed by a detective with the Indianapolis Police Department (IPD) describing the books and films available to sale at the bookstores.

After hearing testimony in support of the petition, the Indiana trial court entered an *ex parte* order finding probable cause to exist to believe that the bookstores had violated state RICO laws. The order directed the immediate seizure of the real estate and personal property comprising the several bookstores and authorized the properties to be padlocked.

On August 3, 1983, IPD officers, at the direction of Goldsmith and pursuant to the Marion Circuit Court's order, padlocked Mendenhall's building and denied Mendenhall access to the same. On August 4, 1983, 4447 Corporation, another Gorelick enterprise, Gorelick and several other defendants filed a motion to dismiss the RICO complaint and a motion to strike the seizure order. After venue had been transferred from Marion Circuit Court to Hamilton Circuit Court, this motion was denied on November 21, 1983. However, an interlocutory appeal was granted by the Indiana Court of Appeals as to the seizure order.

On February 2, 1984, the Indiana Court of Appeals ordered in the interlocutory appeal, among other things, that IPD unlock and release Mendenhall's property, and the same was done. On June 12, 1985, the Indiana Court of Appeals issued an opinion in which the Indiana RICO and CRRA acts were declared unconstitutional, as they constituted an illegal prior restraint under the First

Amendment to the United States Constitution insofar as obscenity was made a predicate offense. *See 4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 592 (Ind.App. 1985).

The present action was commenced on July 3, 1985, and alleged violations of the rights of Mendenhall and Plaza-Hill under the Fifth and Fourteenth Amendments to the United States Constitution as secured by 42 U.S.C. §§ 1983 and 1985.[2] Goldsmith immediately filed a motion to dismiss on the basis of prosecutorial immunity. This motion was denied. On November 15, 1985, the action was stayed pending the continuing state court litigation, then on petition to transfer to the Indiana Supreme Court.

On March 2, 1987, the Indiana Supreme Court took transfer, vacated the Indiana Court of Appeals' opinion and held that the inclusion of obscenity as a predicate offense did not render Indiana's RICO and CRRA acts unconstitutional. *See 4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). On August 1, 1987, IPD, at the direction of Goldsmith, and in light of the Indiana Supreme Court's opinion, repadlocked Mendenhall's property pursuant to the Indiana trial court's original seizure order.

Certiorari was granted in a similar action arising in Fort Wayne, Indiana, and on February 21, 1989, the Supreme Court of the United States ruled that the Indiana RICO statute was not unconstitutional as regards the use

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[2] Another defendant, the DeBartolo Corporation (DeBartolo), was named in the original complaint. DeBartolo had filed suit against Mendenhall in order to enforce a restrictive covenant in the deed of conveyance issued by DeBartolo to Mendenhall. Plaintiffs and DeBartolo settled, and DeBartolo has been dismissed from this action.

of obscenity as a predicate offense but held that pretrial seizure of the bookstores' contents was unconstitutional as a prior restraint in violation of the First and Fourth Amendments to the United States Constitution. *See Fort Wayne Books, Inc. v. State of Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

On April 3, 1989, the Marion County Prosecutor's office and Mendenhall reached a settlement in the pending state court litigation. In sum, Mendenhall agreed not to use his property for an "adult use" in exchange for the State dropping the RICO charges pending against him. Accordingly, Plaza-Hill's building was returned to Mendenhall's control.

On October 4, 1989, the stay was lifted in this action and, on December 7, 1989, Goldsmith renewed his motion to dismiss. On June 11, 1990, Goldsmith's motion, treated as one for summary judgment, was granted as to the claims arising out of 42 U.S.C. § 1983, and on December 5, 1990, his motion was granted as to the plaintiffs' remaining claims against him those arising under 42 U.S.C. § 1985. Each of these rulings was made by Judge William E. Steckler, to whom the case was originally assigned.

On March 22, 1991, one of the remaining defendants, the City of Indianapolis, filed a motion to dismiss for failure to prosecute. The plaintiffs, after obtaining new counsel, responded by filing a motion to amend their complaint, which was granted. An amended complaint,

entitled the "Second Amended and Supplemental Complaint," was filed on November 19, 1991, in which Goldsmith is, once again, named as a defendant.[3] In addition, Marion County, Indiana is named for the first time as a defendant.

Discussion

We will first consider plaintiffs' motion to reinstate Stephen Goldsmith as a party defendant and plaintiffs' motion to amend the second amended complaint by interlineation. These motions were filed subsequent to the filing of the second amended complaint. Since the second amended complaint names Goldsmith as a defendant, the plaintiffs' motion to reinstate him would appear to be redundant. In any event, the motion to reinstate is now granted. As the plaintiffs' motion to amend by interlineation merely seeks to clarify that the second amended complaint is brought against Goldsmith in his individual capacity only, it too is granted.

Next to consider is Goldsmith's motion to dismiss. The test for dismissal under Rule 12(b)(6), F.R.Civ.P., is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46

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[3] The first complaint sought damages allegedly arising from Goldsmith's involvement in seeking and obtaining forfeiture of Mendenhall's real estate from August 1, 1983, until February 2, 1984. The first amended complaint, filed on February 12, 1990, added a damage claim for the loss of the same property from August 1, 1987, to April 3, 1989, as did the second amended complaint.

(1957). The factual allegations of the complaint are to be taken as true and should be "liberally construed in favor of the plaintiff." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *First Interstate Bank of Nevada v. Chapman*, 837 F.2d 775, 776 (7th Cir. 1988).

The plaintiffs raise basically five claims against Goldsmith: (1) that Goldsmith violated the plaintiffs' constitutional rights by filing a civil RICO action against Mendenhall and Plaza-Hill Realty; (2) that the plaintiffs' rights were violated by Goldsmith's seeking the seizure order from the Indiana trial court on August 1, 1983; (3) that the plaintiffs' rights were violated by Goldsmith when he told IPD to enforce the Indiana trial court's seizure order on August 3, 1983; (4) that Goldsmith violated the plaintiffs' constitutional rights by advising IPD to reseal plaintiff's property on August 1, 1987; and (5) that Goldsmith violated the plaintiffs' constitutional rights when on April 3, 1989, his office extracted a promise not to use the Plaza-Hill Property for an "adult use."

Even assuming, as we must under Rule 12(b)(6), F.R.Civ.P., that Goldsmith acted in the manner described in the second amended complaint, we believe that he is not liable for his actions. In sum, Goldsmith's position as Marion County Prosecuting Attorney shields him from liability to Mendenhall and Plaza-Hill if indeed he acted wrongly.

"[P]rosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' . . . insofar as that conduct is 'intimately associated with the judicial phase of the criminal process'. . . . " *Burns v. Reed*, ___ U.S. ___,

111 S.Ct. 1934, 1939, 114 L.Ed.2d 547, 558 (1991) (*citing Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). Absolute immunity is equally applicable to the prosecutor's role in the civil context, at least where the civil suit is quasi-criminal. *See, e.g., Henry v. Farmer City Bank*, 808 F.2d 1228, 1239 (7th Cir. 1986). In the Seventh Circuit, absolute "immunity shields a prosecutor even if he initiates charges maliciously, unreasonably, [or] without probable cause." *Henry*, 808 F.2d at 1238.

However, where a prosecutor is acting in the role of an administrator or investigative officer rather than that of an advocate, as when a prosecutor renders legal advice to police, a prosecutor is not entitled to absolute immunity. *Burns*, ___ U.S. at ___, 111 S.Ct. at 1944, 114 L.Ed.2d at 562-63. Nevertheless, qualified immunity will be available in such a situation unless the official violates "clearly established statutory and constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Like Goldsmith, we believe that the revival of the majority of the present claims is inappropriate in light of this Court's Entry of June 11, 1990. In this Entry, Judge Steckler held that Goldsmith's alleged involvement in filing a civil forfeiture action under CRRA and RICO, as well as in the locking and relocking of the real estate, was shielded by the doctrine of absolute immunity. Accordingly, and since no significant changes in the law have transpired, these claims are again dismissed for the reasons set forth in such Entry.

The only claim not previously addressed by this Court's Entry of June 11, 1990, is the plaintiffs' claim concerning the return of plaintiffs' building in April of 1989. Inasmuch as the opinion in *Fort Wayne Books* was published on February 21, 1989, plaintiffs assert that the padlock on the building at 4266 West 38th Street should have been removed *instanter* and the building returned to plaintiffs at that time. They further contend that the requirement that the building not be used as an adult bookstore was extortionate and without legal authority.

As Judge Steckler noted in his Entry of June 11, 1990, the Supreme Court held in *Fort Wayne Books* that the seizure of the property in that case was unconstitutional only insofar as it concerned the seizure of expressive material without first utilizing a pretrial deprivation hearing to determine whether the inventory seized was obscene. In fact, the Supreme Court expressly stated that it was not holding the pretrial seizure of nonexpressive material invalid. *Fort Wayne Books,* 489 U.S. at 67 n.12.

There existed no ongoing business in the building at 4266 West 38th Street at the time of its seizure. Thus, its seizure only remotely affected the status of protected material, i.e., the books and magazines. Therefore, the building could arguably have been considered nonexpressive property by Goldsmith. Since we are aware of no cases on point to the contrary, we believe it was not clearly established that Mendenhall had a constitutional right to the return of his building on the basis of *Fort Wayne Books.*

As to Mendenhall's contention that his promise not to permit the building to be used as an adult bookstore

constituted extortion, it is not true that the promise was given in exchange for his regaining possession of the building. As stated above, his promise was part of a negotiated settlement which resulted in the dismissal of the CRRA action still pending against him. Accordingly, Goldsmith's motion is granted, and all claims against him in his individual capacity will be dismissed.

Next to consider is the defendant City of Indianapolis (City). As a preliminary matter, we note that in order for Mendenhall to state a claim against the City under 42 U.S.C. § 1983, he must show that the deprivation of his rights came at the hands of a final policymaking authority acting on behalf of the City. The doctrine of *respondeat superior* is not applicable under § 1983. Whether an official had final policymaking authority is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

Mendenhall complains (1) that Goldsmith, acting on behalf of the City, wrongfully seized Mendenhall's property in violation of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; and (2) that the City, through IPD, seized Mendenhall's property, which seizures constituted condemnations without just compensation.

As to the liability predicated upon the conduct of Goldsmith, it is clear that a county prosecutor is not a final policymaking authority for the City. The office of prosecutor, like the office of circuit judge, is established by the Indiana Constitution. Ind. Const. Art. 7 § 16. As such, and like a circuit judge, the prosecutor of a judicial circuit is not a city or county officer, but is rather a state

officer. *Study v. United States*, 782 F.Supp. 1293, 1297 (S.D.Ind. 1991) (Deputy prosecutor position "is one of state office, even though employed by a specific county."); *see also Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 279 (7th Cir. 1991) ("Indiana's circuit, superior and county courts are judicial officers of the State judicial system: 'they are not county officials.' "). Thus, even assuming that Goldsmith acted wrongfully, the City cannot be held liable for Goldsmith's policies.

As to the City's liability predicated upon the actions of IPD, no specific policy or custom of the City has been plead. Indeed, it is apparent from the face of the complaint that IPD was acting at the direction of Goldsmith and/or the trial court, and not pursuant to a policy of the City. As such, the City cannot be held liable under 42 U.S.C. § 1983 for the actions of IPD.

While Marion County has not filed any motion in this matter, it is obvious that for the same reason that the City is not liable, neither is it. Therefore, for all of the above reasons, this action will be dismissed. However, we do not believe that this action can be characterized as frivolous. Accordingly, we deny Goldsmith's request for attorney's fees.

Dated this 4th day of May, 1993.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

APPENDIX C

Transcript of Oral Argument in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989)
(Excerpt: Argument for the State)

* * *

ORAL ARGUMENT OF STEPHEN GOLDSMITH
ON BEHALF OF RESPONDENTS

[p. 30] MR. GOLDSMITH: Mr. Chief Justice, may it please the Court, let me just – Yes, sir.

QUESTION: (inaudible) 47, whatever that number is, out of this case?

MR. GOLDSMITH: We think we're here, your Honor, The Indiana Supreme Court consolidated Fort Wayne and Indianapolis, which is called 4447, and then this Court consolidated, when it accepted the petition for certiorari, the Indianapolis and Fort Wayne cases with the Kokomo case, which is called Sappenfield –

[p. 31] QUESTION: Well, now, you were the prosecuting attorney –

MR. GOLDSMITH: Yes, sir.

QUESTION: – in 4447?

MR. GOLDSMITH: Right.

QUESTION: Well, how is that case here? All we've got is Fort Wayne and Sappenfield.

MR. GOLDSMITH: Well, it's a procedural question, your honor. The Indiana Supreme Court consolidated under the 4447 court cause number, 4444 and Fort Wayne. This Court then accepted certiorari on that cause number in both of those cases. We are listed as –

QUESTION: We accepted the –

MR. GOLDSMITH: Yes, sir.

QUESTION: In 4447?

MR. GOLDSMITH: Yes. Except none of the –

QUESTION: Well, why doesn't –

MR. GOLDSMITH: Well, because – I'm sorry.

QUESTION: Go ahead.

MR. GOLDSMITH: The confusion, your honor, is that the defendants in that case did not become petitioners in this case. The 4447 defendants didn't elect to participate in the argument today.

QUESTION: The case just got here on its own?

[p. 32] No –

(Laughter.)

MR. GOLDSMITH: Well, your Honor, this Court accepted certiorari for – under a petition that came from a cause number that included 4447 and included Fort Wayne. The defendants in 4447 elected not to participate, but the Court granted certiorari. The petitioners listed the state as a respondent and myself – I'm listed as a respondent.

QUESTION: Maybe we granted it improvidently then.

MR. GOLDSMITH: Very well –

QUESTION: I don't recall that we've ever let one side beat up on another who is not even here.

MR. GOLDSMITH: Justice Scalia, I think if I could address my remarks to the overall issue of the RICO laws and the only reason that the Indianapolis –

QUESTION: Don't you sign with the clerk's office who represents who?

MR. GOLDSMITH: Yes, sir. I represent –

QUESTION: Well, did you sign that? Is that filed in our clerk's office?

MR. GOLDSMITH: Yes, sir.

QUESTION: You're sure?

MR. GOLDSMITH: Yes, sir.

[p. 33] QUESTION: ISSI and Plaza Entertainment and Burton Gorlick.

MR. GOLDSMITH: Those were all of the defendants who were rearranged –

QUESTION: Well, what you're submitting, does that go also for them? Are you telling us they are here too?

MR. GOLDSMITH: Well, they are here as not – pursuant to this Court's rules, they are here as nominal respondents because they did not elect to come forward as petitioners. But, nevertheless, may it please the Court –

QUESTION: Well, how come you're representing them?

MR. GOLDSMITH: I represent Sappenfield, Fort Wayne and if 4447 is here, I represent them as well. I represent the State of Indiana in the consolidated RICO cases that are before this court. The only significance to 4447 other than a fact that it continues as a case when this Court is finished with it, is that it is a civil RICO case

without pretrial seizures, Sappenfield is a criminal case that's been stopped midstream without any pretrial seizures, and Fort Wayne is a case with 39 prior convictions and pretrial seizures. They represent a range of what can happen underneath the RICO laws.

[p. 34] In terms of directing attention to the issues, though, I would suggest to the Court that the most important issue in terms of law enforcement in the long run is whether in enforcing a RICO law after judgment, and after conviction, the state may impose sanctions that affect First Amendment materials. It's the post-trial, post-judgment, post-conviction remedies that can be applied to assets, regardless of whether those assets expressive materials, as alluded to in the Arcara case, that are of critical importance in this case and in the future RICO enforcement.

QUESTION: Mr. Goldsmith, will you help me with the issues a little bit. Your opponent agrees they can be applied – the sanctions can be applied to First Amendment materials if they are traced to show they are proceeds of the violations. So, we don't – everybody agrees they can be applied to First Amendment issues. That much is clear, is it not? I just heard him say that a few minutes ago.

MR. GOLDSMITH: Yes, your Honor. But he tried to limit that at tracing. Our position is that it would not stop there.

QUESTION: Well, that's right. Your position is – and is he correct? Do you agree with his statement of your position, that you're saying that if [p. 35] in a

bookstore two obscene books are sold, automatically you can seize the entire inventory? Yes or no?

MR. GOLDSMITH: I don't agree that that could necessarily happen.

QUESTION: Can it happen under your statute?

QUESTION: Well it did.

MR. GOLDSMITH: Justice White, I think in terms of post-trial sanctions, it has not happened in any one of these cases.

QUESTION: I know. But you could answer Justice Stevens what your position is.

MR. GOLDSMITH: My position, Justice Stevens, is post-trial that becomes an Eighth Amendment question, which could or could not occur, depending on the proportionality of the response.

QUESTION: Oh, I'm not asking you about its constitutionality. I'm asking you about the meaning of the statute. If the statute is applied as it's been construed by the Indiana Supreme Court, could you, as the prosecutor, say to the judge, "We have proved that three books were obscene in this store. Kindly enter an order closing the entire store and forfeiting the entire inventory"?

MR. GOLDSMITH: I could –

QUESTION: If that's all you've proved?

[p. 36] MR. GOLDSMITH: I could ask for that remedy and –

QUESTION: And would you be entitled to it under the statute?

MR. GOLDSMITH: It would be a proportionality question. I would be – officially I would be entitled to it under the statute. Yes, sir.

QUESTION: So, the only objections to that relief would be constitutional objections?

MR. GOLDSMITH: If I convince the judge and the Jury and then the outside –

QUESTION: That the three books were obscene and they were sold in a particular store and the rest of the store was filled with nothing but Charles Dickens and William Shakespeare?

MR. GOLDSMITH: Yes, sir.

QUESTION: Well, didn't – wasn't there a seizure of the entire store before trial?

MR. GOLDSMITH: There was a –

QUESTION: Based on just probable cause to believe that obscenity was being sold there?

MR. GOLDSMITH: In the Fort Wayne case, that's true.

QUESTION: A few items of obscenity being sold there?

[p. 37] MR. GOLDSMITH: Well, it was based on the allegation that there had been 39 prior convictions at those three stores.

QUESTION: Yes. But that doesn't necessarily indicate that even a major share of the merchandise in the store were obscene.

MR. GOLDSMITH: Nor, Justice White, no one of these cases takes the position that whether or not the material seized are obscene is significant. It's as to whether they are the proceeds of a prior existing crime to wit an obscenity.

QUESTION: Yes.

MR. GOLDSMITH: And in this particular case, the state maintains that once there is an adjudication of obscenity, then it becomes a proportionality question because of 39 prior convictions, each conviction carries a year sentence. So, the prosecutor had his choice between putting the owner in prison for 39 years or confiscating $25,000, $50,000 or $100,000 worth of books. That's a relationship –

QUESTION: Yes, but I thought – I thought the remedy was seizure of the proceeds of the violation.

MR. GOLDSMITH: The Indiana and Federal Racketeering laws, it's the position of the respondents, allow seizure of proceeds and also seizure of other [p. 38] assets if they are derived from a criminal activity to wit –

QUESTION: Yes, if they are derived from a criminal activity. Now, suppose there is only one book that's been proved obscene and sold. Now, it's awfully hard to conclude that the whole store full of books and the real estate itself is derived from the sale of one book.

MR. GOLDSMITH: Yes, Justice White. We agree with that.

QUESTION: So, that's a state statutory construction problem in the first instance, I suppose.

MR. GOLDSMITH: In the trial court, just because there is a sanction allowed statutorily for a crime doesn't mean that the maximum is automatically going to be imposed.

QUESTION: I agree with that.

QUESTION: I thought you had answered Justice Stevens earlier – that it is a matter of statutory construction. If there were a conviction on the predicate offense, this sort of forfeiture would automatically follow. Are you now saying – or, at least, are you saying, whether you said something different before or not, that the trial court has discretion to determine what sort of a penalty along [p. 39] those lines will be imposed?

MR. GOLDSMITH: Mr. Chief Justice, that's correct. I meant to answer Justice Stevens, his direct question. He would be allowed to ask that under the statute. It wouldn't in any way be mandatory. The trial judge would have discretion to fashion the penalty in the same way he would fashion the penalty in years, fashion the penalty in terms of fine, and fashion the penalty in terms of confiscation and forfeiture of assets. They all are ways to enforce a law. RICO, as this Court has ruled is –

QUESTION: You're getting me confused now. I thought you said before that it doesn't have to be – I thought you said earlier it doesn't have to be proceeds derived from the obscenity.

MR. GOLDSMITH: That's the state's position.

QUESTION: You said that. But just now you've said it has to be derived from, what are talking about? How does the Indiana statute work? Is it necessary that

there be a derivation from – derived from the proceeds of the unlawful activity or not?

MR. GOLDSMITH: There has to be a nexus between what you're trying to forfeit –

QUESTION: Oh, of course.

MR. GOLDSMITH: – and what you have previously [p. 40] convicted for or judged. What we disagree with the petitioners on is the need to trace the assets from book up to organized crime back to another bookstore. We don't believe that that –

QUESTION: What is the nexus? It's enough that you sold it in the same business? Is that enough?

MR. GOLDSMITH: The people would need to be same. You would have to show that they invested money from the first criminal proceeds into the second criminal proceeds. You'd have to show relationship in terms of enterprise between those two.

QUESTION: Yes. But, Mr. Goldsmith, if I'm not mistaken, you have two ways of describing the term criminal activity. The two obscene sales are one form of criminal activity. But they also, if I understand you correctly, make the entire enterprise in which those books were sold a criminal enterprise and an unlawful activity, under your RICO statute.

So, if the bookstore has sold two or three obscene books, it becomes, in its entirety, a criminal activity. Isn't that the way it works?

MR. GOLDSMITH: Yes.

QUESTION: And, therefore, everything in the store is automatically subject to forfeiture because the whole store is a criminal activity by reason of the fact [p. 41] that the two obscene books were sold there. Isn't that the way it works?

MR. GOLDSMITH: It does. But just so I – it's automatically is subject to forfeiture. That doesn't automatically mean that a court would exercise its discretion if there were a proportionality problem.

The same is true – this case is no different than the –

QUESTION: But how can there be a proportionality problem if under the RICO statute the pattern of activity is satisfied by the sales of two or three items which are part of the ongoing business? Then the whole business is a criminal enterprise. Isn't that – that's the way RICO works I thought.

MR. GOLDSMITH: It does.

QUESTION: Yes.

MR. GOLDSMITH: The court, it's the state's position, would fashion the remedy at the extent and scope that it wished. The same as the 39 prior convictions, it could put the person who owned it in jail for 39 years or one year.

Similarly, we view this case as an Arcara case and that simply says that this is no different than if there was narcotics sold at store one and the person sold the cocaine three times and two times, took the [p. 42] money and went into business in a toy store or bookstore or any other sort of store. That would be subject to the confiscation of the state.

And to rule that this case is anything else, would reduce the sanctions of racketeering laws. It would provide a safe haven behind expressive materials for organized crime. That's why we believe this case is an Arcara case.

And if it's not an Arcara case, it's an Eighth Amendment case. But it's surely not a First Amendment issue.

QUESTION: Mr. Goldsmith, do you also defend the right of the state to get a pretrial seizure without any hearing pre or post-seizure and based on a conclusory affidavit of the police officer?

MR. GOLDSMITH: Justice O'Connor, this is the most difficult position for the state to maintain in this case.

QUESTION: No. I just asked if that's the position you take.

MR. GOLDSMITH: It is the position of the state –

QUESTION: That's perfectly okay?

MR. GOLDSMITH: – that if in the Fort Wayne case with 39 prior convictions beyond a reasonable [p. 43] doubt, an allegation of identity of parties that that was permissible conduct, but we admit, your Honor, that that is the most difficult position for the state to maintain in this case.

QUESTION: Well, you concede that the seizure of Fort Wayne Books and the stores was not to preserve evidence for trial?

MR. GOLDSMITH: Yes, we concede that.

QUESTION: Okay.

MR. GOLDSMITH: And that's one reason that it's come back –

QUESTION: Then how do you avoid the Marcus rule, do you think? Why doesn't that apply?

MR. GOLDSMITH: Well, I think that if it doesn't apply – we may –

QUESTION: Why doesn't it apply?

MR. GOLDSMITH: It would not apply, your Honor, because of the 39 prior convictions. But I would suggest to the court – because this is really just a continuation of the first action. Federal RICO is all in one action and Indiana RICO collateral estoppel from the criminal cases.

I would also acknowledge, your Honor, this is a very difficult position for the state and it may be that the RICO laws pretrial ex parte we have a Brockett [p. 44] severance issue that ought to occur here as it relates to the pretrial ex parte seizures. I'm going to be very careful, though, to separate that in terms of my argument from the sanctions post-trial which we believe present an Arcara issue.

But I do acknowledge that the pretrial seizures, without a hearing, present a very difficult position for the case, for the state and it's based on, however, the prior 39 convictions. That's the way we distinguish the case.

QUESTION: Does this statute provide for fines?

MR. GOLDSMITH: Yes, sir.

QUESTION: What's the maximum fine?

MR. GOLDSMITH: The maximum criminal fine, I believe is $10,000, Mr. Chief Justice.

QUESTION: Well, now, is it your position that the non-obscene portion of the books sold could be forfeited even though, say, they were of a value of $40,000 or $50,000 as a result of a successful criminal prosecution?

MR. GOLDSMITH: The legislative procedure in Indiana is that the state could bring a civil action based on the criminal conviction and ask for remedy in excess of the $10,000. That, your Honor, we think is reasonable given the fact that the court had an option [p. 45] between $10,000 and eight years, and what this court would be doing if it were to suggest that the forfeiture is unconstitutional under the Eighth Amendment is to say that a seizure of $50,000 or $100,000 is a more severe penalty than the eight years.

And we think it would not restrict expressive material to take a million dollar operation – we haven't even had a chance to go to trial to show the factual worth of the defendant – and take a $50,000 or $100,000 penalty, we may have a much less restrictive effect on expressive rights than putting the owner in jail for eight years.

QUESTION: Yes, but then this is something quite different, really, from saying that you're fined $10,000 and these books are attached to make sure that you pay the fine.

MR. GOLDSMITH: It's different in that under a fine the defendant has the option from where he should get the money. Yes, sir.

QUESTION: And it's also different in that there is no particular monetary limit on it.

MR. GOLDSMITH: There is no limit in terms of obscenity of narcotics or anything else to RICO enforcement nationally or at the state level. That's correct.

[p. 46] That's why, Mr. Chief Justice, we believe this is an Eighth Amendment proportionality issue and not a First Amendment expressive material question. If this does – the state's position is that we need to begin first with Arcara post-trial. After look at Arcara and satisfy ourselves that this does not relate – this is content-neutral, does not relate to expressive materials – the obscenity is a predicate. Once it's found to be obscene, it's the same as drugs. Then you move – that's the issue one. There's an expressive issue on the front side.

On the back side are the sanctions. The sanctions, it is our position, make no difference whether they are books that are involved, or any other material where enforcing is sanctioned. And in that regard, it's either Arcara, or it is an O'Brien test, as modified by Albertini.

Albertini clearly said that an incidental burden on speech is no greater than is essential and, therefore, it's permissible under O'Brien so long as neutral regulation promotes a substantial government interest. This promotes a substantial government interest.

Finally, the discussion of Near we believe also is misdirected. In that case, the Court exactly said [p. 47] they were not looking at the permissible scope of subsequent punishment.

This is a subsequent punishment case and not a prior restraint case. Once there is a conviction for obscenity, it is a subsequent punishment and not a prior restraint. And if it has incidental effect, it has incidental effect under the O'Brien test as modified by Albertini.

QUESTION: Are you just going to leave it up in the air on the pretrial seizures or are you just going to say that that's a difficult question? Are you conceding error?

In the Fort Wayne case you say there are 39 priors that had already been adjudicated and you save the pretrial procedures on that basis. But how about this other case that you say is here?

MR. GOLDSMITH: There are –

QUESTION: Which I'm not sure it is, but if it is, there weren't 39 priors in those cases.

MR. GOLDSMITH: That's right. And in that case, your honor, there were three bookstores. Two which were open –

QUESTION: Right.

MR. GOLDSMITH: – and the court explicitly allowed them to stay open and sell their books and [p. 48] didn't interfere at all because they were ongoing businesses.

The third store was not open yet and the 72-hour order was that they come into court before they opened up. The object of the Indianapolis pretrial orders was to maintain the status quo until a full adversarial hearing 72-hours later.

I would submit and I would concede that RICO cannot and should not allow ex parte closure of bookstores absent prior convictions. That clearly would be unconstitutional.

QUESTION: Absent prior convictions?

MR. GOLDSMITH: Yes, sir. And with prior convictions, we would acknowledge that there is no authority from this Court directly on point either way.

QUESTION: Well, you know, in a RICO case like this were you allege but haven't yet proved three obscenity violations, you would say that until the actual case is tried out you cannot seize or close down the business?

MR. GOLDSMITH: Absolutely not. It would clearly be a violation of their First Amendment rights.

QUESTION: But you would allow an order preventing the wasting of assets?

MR. GOLDSMITH: Clearly, Justice Scalia, the [p. 49] same as a narcotics case, an order not to dissipate assets would be appropriate. And I would suggest, in modification to my prior answer, if there were some allegation that the assets were being moved to Europe, that it might be proper to seize them.

But absent a suggestion that the assets are to flee, an order not to dissipate, which was the Indianapolis order not to dissipate – the reason that I'm so intent on that, Justice Scalia, is because the important tool here is the post-trial sanction which looks just like any other penalty after trial because obscenity does not have any First Amendment expression.

And this remedy is content neutral. In this particular case it's applied to a bookstore. But if it were applied to any other set of assets, it would be the exact same discussion.

QUESTION: Don't you think that your state supreme court held that you could have a pretrial seizure of the bookstore just based on probable cause?

MR. GOLDSMITH: I think that the Indiana Supreme Court held – three justices held that in the Fort Wayne case with prior convictions there could be a pretrial seizure. Yes, sir. One of the chief justices dissented on the Fort Wayne case.

QUESTION: But there is no holding that – [p. 50] there is no holding that just on probable cause you could have a pretrial seizure?

MR. GOLDSMITH: That's correct. There is no holding. And I think that what we're facing here is if the Court is troubled by the facial ex parte ability of the Indiana law, that we have a Brockett analysis that ought to be made, and that part ought to be severed out. But it should not affect the remedial opportunities of federal or state RICO.

And the best way to look at that is the Sappenfield case. It's a traditional criminal case that wants to go to trial based on obscenities as the predicate and enforce a sanction at the other end. That is a typical RICO case and the issue of ex parte seizure at the front end shouldn't affect the court's sanctions on the back end of the case.

It's particularly important that we consider this case – this Court has accepted any number of remedies that

affect expressive materials so long as they are not aimed at the content of those materials.

QUESTION: If we sustain the statute, it has a strong deterrent effect on your state, does it not?

MR. GOLDSMITH: Absolutely. Yes, sir.

QUESTION: Don't you think in candor that some businesses which sell books as just part of their [p. 51] inventory might give up that line of inventory just to keep well clear of the statute?

MR. GOLDSMITH: Justice Kennedy, I acknowledge that this has a powerful deterrent effect. I'm not particularly embarrassed about that. I don't think it would cause people to stop selling books. I think that it might cause persons to conform their sale of obscene books more on the side of indecent books.

But, of course, that's the purpose of criminal obscenity laws. It is to deter conduct. And I think that what we have before the Court today is an acknowledgement that obscenity is a powerful source of funds for criminal activities and that we have a sanction that is equally powerful. And if the state –

QUESTION: But are you completely confident that the deterrent is not so strong that indecent but non-obscene expression is not going to be affected?

MR. GOLDSMITH: Your Honor, it's the state's position that obscenity law in the United States today has developed to such a hard-core standard and is so clearly understood to have such a hard-core standard that I would anticipate that it would have a deterrent effect on legitimate sale and expression of ideas.

And that would not be the case because, even here, there has to be a conviction for the obscenity [p. 52] predicate. And we don't believe that it would have a chilling effect, but rather a deterrent effect, on people who are involved in the expression of ideas.

QUESTION: – Smith in California was decided, wasn't it?

MR. GOLDSMITH: Well, this case relates not to the content of the materials. But this case does not come into being until there is a finding of obscenity. And then the sanctions are in place. And we believe that that differentiates it from the prior rulings of this court. That's why we think it's an O'Brien/Albertini case if it's a First Amendment case at all.

QUESTION: Incidently, Mr. Goldsmith, you must be tired of my pressing 1447, or whatever it is. Is there a separate judgment in that case?

MR. GOLDSMITH: There is no judgment in any case before this Court today. There is a ratification by the Indiana Supreme Court of the facial constitutionality of the RICO laws which would allow the enforcement of sanctions by the court.

QUESTION: Well, did the Indiana Supreme Court enter a judgment in 4447?

MR. GOLDSMITH: The Indiana Supreme Court's opinion applies to 4447. The court case hasn't yet been [p. 53] tried because it's –

QUESTION: Well, I know. But the Indiana Supreme Court entered some kind of judgment, did it not?

MR. GOLDSMITH: The judgment of the Court was to reverse the court of appeals and remand the case back for trial. One of the three – just to give you an idea of the import of the sanctions here, one of the three stores was burned down. There was an arson conviction in federal court. And under federal racketeering law, the interests of that person in these other stores were forfeited.

So, we have a closure from an arson as a predicate that really parallels what we would see from obscenity as a predicate.

QUESTION: It's a small point.

QUESTION: There's been a final judgment that pending trial in the Fort Wayne case that the stores may be closed.

MR. GOLDSMITH: Yes, sir, that's correct.

QUESTION: And you say that's permissible because there were 39 prior convictions?

MR. GOLDSMITH: That's correct.

QUESTION: I just want to get one small point on the meaning of the statute. The predicate of – you have to have – what is it, two or three?

[p. 54] MR. GOLDSMITH: Two.

QUESTION: And is it two sales of the same book or does it have to be two different books?

MR. GOLDSMITH: This is a basic racketeering law. It requires two predicate offenses. The predicate offenses have to be obscenity. It could be one book. I

suppose it could be two books at two separate times that were sold.

QUESTION: But it could be the same book on Monday and then another copy of that book on Tuesday?

MR. GOLDSMITH: Or it could be two murders or it could be two heroin –

QUESTION: Yes. But I'm just asking you a question about this.

MR. GOLDSMITH: That's right. So, the conviction or judgment for those offenses would throw the case back into the RICO analysis if there was a common enterprise. And what we really have here is not a draconian response. I prefer to use the Russello analysis that we have new weapons of unprecedented scope and we're dealing with an organization with lots of money and so they're financial remedies, instead of the traditional criminal remedies, which put the store clerk in jail for a number of years.

And we believe that these remedies post-trial, [p. 55] at least, fall within traditional First Amendment and Eighth Amendment literature. And if they have an incidental effect under O'Brien and Albertini, that that effect is constitutional. And deprive the right of the state to use its sanctions in a racketeering law essentially and when it involves bookstores, provides a safe haven behind which narcotics dealers can buy a few books and provide a facade of responsibility.

We believe the state's sanctions should not be limited. This is really what this is; it's an Arcara case and it's not a First Amendment case. That the sanctions which

ultimately come before this Court, need to be judged in terms of Eighth Amendment, a proportionality law as applies to all the RICO laws.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldsmith. The case is submitted.

* * *

APPENDIX D

Second Amended Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BURKE H. MENDENHALL and PLAZA-HILL REALTY CORPORATION (an Indiana corporation), Plaintiffs, vs. STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit of Indiana; the CITY OF INDIANAPOLIS, INDIANA; and MARION COUNTY, INDIANA, Defendants.	Cause No. IP85985C

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

COUNT I

COMES NOW, Burke H. Mendenhall ("Mendenhall"), and Plaza-Hill Realty Corporation ("Plaza-Hill"), and for their claim for relief jointly and separately, respectfully state:

1. Mendenhall is the president and sole shareholder of Plaza-Hill and brings this action in his own right and also on behalf of Plaza-Hill. At all times relevant to the events alleged in this Complaint, Mendenhall was a developer of real estate, and developed, and leased an 8,000 square foot shopping plaza free standing building located at 4266 West 38th Street, Indianapolis, Indiana. On March

15, 1984, title to the real estate was transferred from Mendenhall to Plaza-Hill.

2. At all times relevant to the events alleged in this Complaint, Stephen Goldsmith ("Goldsmith"), was the lawfully elected and acting Prosecuting Attorney for the 19th Judicial Circuit of the State of Indiana, which Judicial Circuit encompasses Marion County, and the City of Indianapolis and is located completely within the Southern District of Indiana.

3. The office of Prosecuting Attorney is principally responsible for the prosecution of criminal offenses filed in the name of the State of Indiana and is a constitutional office created and authorized pursuant to Article 7, Section 16 of the Indiana Constitution. In addition, as Prosecuting Attorney, Goldsmith was the agent of the City of Indianapolis and Marion County, Indiana. As the elected prosecutor, Goldsmith was responsible for establishing the policy of the Office of the Prosecuting Attorney for Marion County.

4. Goldsmith, as Prosecuting Attorney, was authorized and empowered by the Indiana General Assembly pursuant to legislation enacted as Indiana Code 35-45-6-1, et seq. [the Indiana Racketeering Influenced and Corrupt Organizations Act (RICO)], to file a complaint under Indiana Code 34-4-30.5-2, as a party to a private civil dispute as authorized by Indiana Code 34-4-30.5-1 et seq. [Civil Remedies for Racketeering Activity (CRRA)] under color of State law.

5. The City of Indianapolis is a municipal corporation, a body politic of the State of Indiana, authorized to sue and be sued, and was created and chartered by

Indiana law and is situated completely within the Southern District of Indiana.

6. Marion County, Indiana, is a body politic of the State of Indiana, authorized to sue and be sued, and was created and chartered by Indiana law and is situated completely within the Southern District of Indiana.

7. Pursuant to Indiana Code 36-3-1, et seq., the governments of the City of Indianapolis and Marion County were consolidated into a single unit of government.

8. In the exercise of its governmental functions, the City of Indianapolis utilizes the Indianapolis Police Department as its agency to enforce ordinances of the City of Indianapolis and of the laws of the State of Indiana.

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 1343 and 42 U.S.C. § 1983.

10. On June 1, 1983, Mendenhall leased a portion of the building located at 4266 West 38th Street, Indianapolis, Indiana, to one Burton Gorlick, d/b/a Plaza Entertainment Center, for the purpose of operating a retail sales business, under a five year lease term with two five year extension options. The lease specifically required that the tenant observe all laws and ordinances of the State of Indiana and the City of Indianapolis.

11. On June 11, 1983, Mendenhall, pursuant to the lease, surrendered possession of the leased premises to Plaza Entertainment Center. Gorlick and/or Plaza obtained the necessary zoning and use permits and other required governmental licenses and permits to open its adult bookstore business. The business would have been

in competition with approximately 68 other adult bookstores operating at 43 separate locations in Marion County, Indiana.

12. On August 1, 1983, Goldsmith, acting in his capacity as the Prosecuting Attorney for the 19th Judicial Circuit did cause to be filed in the Circuit Court of Marion County, Indiana, and to be docketed as Cause No. C83-1788, a Complaint against 4447 corporation, a corporation controlled by Burton Gorlick, which alleged the existence of an "illegal enterprise" in violation of the Indiana RICO statute, I.C. 35-45-6-1, et seq. The alleged illegal enterprise outlined in the Complaint consisted of the Plaza Entertainment Center and two other operating adult video and bookstores allegedly under the common ownership and control of Burton Gorlick. The Complaint named as defendants the corporations and individuals directly participating in the operation of the adult bookstores. Mendenhall and the landlords of one of the operating stores were named as defendants solely because they had entered into commercial leases for the properties in which the businesses were ultimately located. A copy of the Complaint was included in Appendix A, Pages 26-34 of Mendenhall's original complaint in this action and is incorporated herein by reference.

13. Also on August 1, 1983, Goldsmith caused to be filed in the Circuit Court under the same cause number, his "Verified Petition for Seizure of Property Subject to Forfeiture," which requested, among other relief, that Mendenhall's real estate be seized and forfeited. A copy of the Petition was included in Appendix A, Pages 35-42, of Mendenhall's original complaint in this action and is incorporated herein by reference.

14. The civil RICO Complaint filed by Goldsmith invoked the entire panoply of injunctive and forfeiture remedies authorized by the statute against those allegedly associated with the "illegal enterprise," the purpose of which was "to operate . . . adult bookstores." To establish the alleged probable cause, the Complaint relied upon an affidavit relating that Indianapolis Police Detectives had visited the two operating adult bookstores under the control of Gorlick where they discovered what they considered to be sexually explicit magazines, films, and video tapes, and purchased four of the films. The Police affidavit also recited that the detectives had visited the unopened Plaza Entertainment Center, located in the building owned by Mendenhall, and observed magazines, films, and other sexually-oriented material. Construction workers informed the detectives that the store would open in the near future. This affidavit and the four films were presented to establish the alleged probable cause that the alleged "enterprise" had twice violated Indiana obscenity laws, as predicate offenses subjecting the defendants to civil RICO liability under I.C. 35-45-6-2 and the related civil remedies for racketeering activity (CRRA), under I.C. 34-4-30.5-1 et seq.

15. The Complaint alleged that Burke Mendenhall was the owner of the real property located at "4276" West 38th Street (stating the incorrect address of the premises), which was the site of the Plaza Entertainment Center. Other than alleging the landlord-tenant relationship between Mendenhall and Plaza Entertainment Center, there were no factual allegations in the Complaint that Mendenhall and joined or participated in the alleged

illegal enterprise. Similarly, the Verified Petition for Seizure of Property Subject to Forfeiture contained no factual allegations that Mendenhall was a member of or a participant in the alleged illegal enterprise. The Petition simply stated that Mendenhall owned the real property that was leased to Gorlick and/or Plaza Entertainment Center.

16. Also on August 1, 1983, following the ex parte presentation of the Complaint and the Petition, a Judge Pro-Tempore of the Circuit Court of Marion County, issued his "Findings of Fact and Order" finding that the three adult bookstores were in violation of the law and subject to forfeiture. A copy of the Findings of Fact and Order was included in Appendix A, Pages 43-44, of Mendenhall's original complaint in this action and is incorporated herein by reference.

17. On or about August 3, 1983, Goldsmith, in his capacity as Prosecuting Attorney for the 19th Judicial Circuit, and acting on behalf of the City of Indianapolis and Marion County, Indiana, did order, direct, and advise officers of the Indianapolis Police Department to execute the Order of the Circuit Court of Marion County. Officers of the Indianapolis Police Department, acting under color of State law, to-wit, Indiana Code 35-45-6-2 did padlock and seal the premises located at 4266 West 38th Street and otherwise seized the real property belonging to Mendenhall. Goldsmith, the City of Indianapolis, and Marion County, acting through the Indianapolis Police Department, did deny Mendenhall access to his real property.

18. Goldsmith, acting in his own right and on behalf of the City of Indianapolis and Marion County, violated

the First, Fourth, Fifth, and Fourteenth Amendment rights of Mendenhall and Plaza-Hill by seeking the seizure order from the Circuit Court of Marion County when there was no lawful basis for such seizure.

19. Goldsmith, acting in his own right and on behalf of the City of Indianapolis and Marion County, ordered, advised, and directed officers of the Indianapolis Police Department to violate the Fourth, Fifth, and Fourteenth Amendment rights of Mendenhall and Plaza-Hill by seizing the real property belonging to Mendenhall and Plaza-Hill even though the seizure order of the Marion County Circuit Court was defective on its face in that the Complaint and the Petition for Seizure upon which it was based clearly failed to establish probable cause for violation of the Indiana RICO statute on the part of Mendenhall.

20. Goldsmith, acting in his own right and on behalf of the City of Indianapolis and Marion County, ordered, advised, and directed officers of the Indianapolis Police Department to violate the First, Fourth, Fifth, and Fourteenth Amendment rights of Mendenhall and Plaza-Hill by seizing the property belonging to Mendenhall and Plaza-Hill where there had not been a determination of obscenity following an adversary hearing.

21. On August 4, 1983, Gorlick and the operators of the bookstores which were the subject of the Seizure Order filed motions to dismiss the RICO complaint and to strike the ex parte seizure order. Following transfer of venue to the Hamilton Circuit Court, these motions were denied on November 21, 1983.

22. On December 1, 1983, Mendenhall filed his own motion to dismiss alleging that the Complaint was legally insufficient to establish any liability on his part under the RICO/CRRA statutes. In his motion, Mendenhall argued that the Complaint and Petition simply alleged that he had leased retail premises to the Plaza Entertainment Center and that the leasing of property did not constitute participation in the alleged illegal enterprise. Mendenhall's motion was denied on August 15, 1984.

23. On February 2, 1984, the Indiana Court of Appeals upon an interlocutory appeal brought by Gorlick and the tenant defendants reviewed the forfeiture order of the Marion County Circuit Court entered on August 1, 1983, and ordered modification of that order and directed that the Indianapolis Police Department unlock, unseal, and release all property located at 4266 West 38th Street, Indianapolis, Indiana. Subsequent to that order Mendenhall regained possession of his real property. A copy of that Order was included in Appendix A, Pages 45-46, of Mendenhall's original complaint in this action and is incorporated herein by reference.

24. On June 12, 1985, the Indiana Court of Appeals issued its opinion holding that the Indiana RICO statute was unconstitutional insofar as obscenity was made a predicate offense for a RICO violation.

25. On March 2, 1987, the Indiana Supreme Court reversed the Court of Appeals and upheld the Constitutionality of the inclusion of obscenity violations as predicate offenses under the State RICO statute.

26. During the pendency of the appeals, the tenants Burton Gorlick and Plaza Entertainment Center,

defaulted under the commercial lease of Mendenhall's property and the premises were relet to Video and Gift Center, Inc., which took possession of the property on August 1, 1987. Video and Gift Center, Inc., is a business entity completely unrelated to Burton Gorlick, Plaza Entertainment Center, or any of the other defendants in the civil RICO action filed by Goldsmith.

27. On or about August 1, 1987, Goldsmith, acting in his own right and on behalf of the City of Indianapolis and Marion County, Indiana, and Deputy Prosecutor Deborah J. Daniels, ordered, advised, and directed officers of the Indianapolis Police Department to reseize, reseal and repadlock Mendenhall's property located at 4266 West 38th Street, Indianapolis, Indiana. The action of the Indianapolis Police Officers was taken on the specific order, advice, and direction of Goldsmith and Daniels without any further judicial process authorizing the seizure. This seizure of Mendenhall's property violated his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

28. On February 21, 1989, the Supreme Court of the United States, in the case of *Fort Wayne Books, Inc. v. Indiana*, ___ U.S. ___, 109 S.Ct. 916 (1989), held that pretrial seizures of property under the Indiana civil RICO statute where the predicate offenses relied upon were obscenity violations was unconstitutional unless there had been first a determination of obscenity following an adversarial hearing.

29. In spite of the decision of the United States Supreme Court holding the seizure of Mendenhall's property to have been unconstitutional, Goldsmith, acting in

his own right and on behalf of the City of Indianapolis and Marion County, refused to return said property to Mendenhall until April 3, 1989. In order to obtain possession of his property Mendenhall was ultimately forced to sign an agreement upon the demand of Attorney J. Gregory Garrison, who was acting for and on behalf of Goldsmith, in which Mendenhall had to promise never to lease his property for any "adult use." The extraction of this agreement from Mendenhall which eliminated a class of tenants to whom he could lease his real estate constituted an illegal taking of Mendenhall's property without due process of law in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

30. As a result of the violation of Mendenhall's rights as set forth above, the forfeiture of his real estate from August 1, 1983, to February 2, 1984, and from August 1, 1987, to April 3, 1989, the groundless naming of Mendenhall as a defendant in the civil RICO action against Gorelick and others, the resultant adverse publicity, the loss of Mendenhall of control of his property, the interference with his contractual relations with his tenant Burton Gorelick, the interference with his contractual relations with the subsequent tenant, the extraction of an agreement not to lease to a broad class of lawful "adult use" tenants, the humiliation, embarrassment to friends and relatives, emotional distress, invasion of his right to privacy and his family's right to privacy, exposure to ridicule, loss of credit, loss of prestige, loss of business opportunity, and other permanent damage to his career as a real estate developer, Mendenhall and Plaza-Hill

have been damaged in the sum of Five Million Dollars ($5,000,000.00).

31. The defendants Marion County and the City of Indianapolis, by their above acts set forth above, and by and through their agent, Goldsmith, and their declared and undeclared policy of interfering with the rights of owners and operators of adult bookstores and their landlords, were direct participants in the violation of Mendenhall's and Plaza-Hill's civil rights.

32. In engaging in the acts which resulted in the violation of Mendenhall's and Plaza-Hill's civil rights, Goldsmith acted in violation of well established constitutional principles.

33. Goldsmith's actions constituted willful or malicious violations of Mendenhall's and Plaza-Hill's constitutional rights. Goldsmith acted intentionally in gross disregard of Mendenhall's and Plaza-Hill's constitutional rights. Goldsmith acted in reckless disregard of whether or not he was violating Mendenhall's and Plaza-Hill's constitutional rights. Mendenhall and Plaza-Hill are entitled, therefore, to exemplary and punitive damages.

WHEREFORE, Burke H. Mendenhall and Plaza-Hill Realty Corporation pray under Count I that they be awarded compensatory damages in the amount of $5,000,000.00 to which should be added as exemplary damages an additional $5,000,000.00 as against defendant Goldsmith and that the Court award reasonable attorney's fees against all defendants including Goldsmith, and the costs of this action and all other relief just and proper in the premises.

COUNT II

FOR INVERSE CONDEMNATION BY THE CITY OF INDIANAPOLIS AND MARION COUNTY

COMES AGAIN Burke H. Mendenhall and Plaza-Hill Realty Corporation and for their additional claim of relief against the City of Indianapolis and Marion County allege:

1. Plaintiffs reallege Rhetorical Paragraphs 1 through 33 of Count I of this Complaint as though fully recited herein.

2. This Court has pendant or ancillary jurisdiction over the matters alleged in this Count because it states a separate but parallel cause of action to the federal questions raised in Count I.

3. On the 1st day of August 1983, Mendenhall was the owner in fee simple of real estate generally known as 4266 West 38th Street, Indianapolis, Marion County, Indiana. On that date, Mendenhall's real property was seized by Officers of the Indianapolis Police Department and was retained by the City of Indianapolis and Marion County in violation of Mendenhall's ownership rights until approximately February 2, 1984.

4. On March 15, 1984, title to the real estate was transferred from Mendenhall to Plaza-Hill.

5. On August 1, 1987, Plaza-Hill's real property was again seized by Officers of the Indianapolis Police Department and held in violation of Plaza-Hill's right to ownership until April 3, 1989.

6. As of April 3, 1989, the City of Indianapolis and Marion County seized said real estate by extracting an agreement not to lease said real estate to a broad class of lawful "adult use" tenants.

7. On August 1, 1983, August 1, 1987, and April 3, 1989, the City of Indianapolis and Marion County seized said real estate for public purposes, ejecting the rightful owner Mendenhall and Plaza-Hill therefrom, and did thereby acquire the real property by eminent domain, but without formal condemnation proceedings.

8. In seizing the real estate for a public purpose, the City of Indianapolis and Marion County did so under a contract with Mendenhall and/or Plaza-Hill, implied in law, to tender to the registry of the Court the fair and reasonable market value of the real estate at the time of the taking.

9. The City of Indianapolis and Marion County have powers of eminent domain and are obliged under the laws of the State of Indiana to tender to the registry of the Court the full purchase price on or before the date of the actual taking, which occurred on August 1, 1983, August 1, 1987, and April 3, 1989, at which time possession passed to the City of Indianapolis.

10. That each of said takings constituted inverse condemnations in that the property was not properly appropriated under law and Mendenhall and Plaza-Hill are entitled to just compensation for said takings plus interest from the date of the takings.

11. The value of Mendenhall's real estate at the time of its taking by the City of Indianapolis and Marion

County for public purposes on August 1, 1983, was $1,250,000.00.

Wherefore, Burke H. Mendenhall and Plaza-Hill Realty Corporation pray under Count II that they be awarded just compensation for each said taking with interest from the date of each of said taking and for all other relief just and proper in the premises.

Respectfully submitted,

/s Robert C. Perry
Robert C. Perry

/s/ David J. Ryan
David J. Ryan

APPENDIX E

Excerpts of Appellant's Brief in
Mendenhall v. Goldsmith, 59 F.3d 685 (7th Cir. 1995)

Brief of Appellee Goldsmith,
pp. 12-14

* * *

III. PROSECUTOR GOLDSMITH IS ENTITLED TO QUALIFIED IMMUNITY FOR HIS ACTIONS.

Even if this Court were to find that prosecutor Goldsmith is not entitled to absolute immunity, it should affirm the dismissal of the complaint on the ground of qualified immunity.

This Court has succinctly summarized the qualified immunity standard as follows:

> The doctrine of qualified immunity shields government officials performing discretionary functions from liability for damages when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Knowledge of a general right is not sufficient to invoke liability; "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). This test "focuses on the state of the law at the time of the alleged violation." *Zook v. Brown*, 748 F.2d 1161, 1164 (7th Cir. 1984).

Williams v. Anderson, 959 F.2d 1411, 1414 (7th Cir. 1992). The plaintiff bears the burden of convincing the court that a clearly established constitutional right existed at the time of the actions in question. *Sherman v. Four County*

Counseling Center, 987 F.2d 397, 408 (7th Cir. 1993). Until a particular constitutional right has been stated so that reasonably competent officials would agree on its application to a given set of facts, it has not been clearly established. *Sherman*, 987 F.2d at 401.

In this case the Plaintiffs cannot carry their burden. Indeed, this case presents a classic example of the reason for qualified immunity. Indiana's appellate courts, reviewing this and other cases, reached opposite conclusions, always over dissents. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987); *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985). The United States Supreme Court found the issues to be sufficiently novel to grant certiorari and decide them in *Fort Wayne Books v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), a case which engendered several opinions and upheld Indiana's RICO statute on its face on the First Amendment issues presented.

Moreover, as the district court held (App. 13), the only constitutional rights established in the Plaintiffs' favor in *Fort Wayne Books* was the first Amendment right to a pre-trial deprivation hearing before the seizure of *expressive* materials – the holding did not apply to the seizure of non-expressive materials. *Fort Wayne Books*, 489 U.S. at 67 n.12. Thus the padlocking of the property at 4266 West 38th Street, which was not an on-going business at the time of its seizure, not violate any established First Amendment right even after the decision in *Fort Wayne Books*.

The due process aspects of *ex parte* civil seizures were not clearly established until December 1993 when, in a

5-4 decision, the Supreme Court held that a civil seizure of real property under 21 U.S.C. § 881(a)(7) must be preceded by notice and an opportunity to be heard. *United States v. James Daniel Good Real Property*, ___ U.S. ___, 62 U.S.L.W. 4013 (1993).

Thus it is apparent that prosecutor Goldsmith would be entitled to qualified immunity even if he were not entitled to absolute immunity. Because this is clear from the record, the district court's judgment of dismissal can be affirmed on this ground without a remand.

* * *

Brief of Appellant Mendenhall,
pp. 22-24.

* * *

The absolute immunity claim of Goldsmith is a defense to be demonstrated by Goldsmith, not Mendenhall. The claims of Mendenhall alleging that Goldsmith was "acting in his own right and on behalf of the City of Indianapolis, and Marion County," with the additional allegations that Goldsmith and the City of Indianapolis "were direct participants in violation of Mendenhall's and Plaza-Hill's civil rights" under declared and undeclared official policy, practice, and custom of the City of Indianapolis that targeted for closure owners of adult book stores as a class, stated cognizable 42 U.S.C. Section 1983 claims, and are sufficient to withstand a motion to dismiss under Federal Rule 8(a)(2).

Conly v. Gibson, 355 U.S. 41, (1957). Under notice pleading, "a short and plain statement of the claim" is all that is required, and alleging a single instance of misconduct is sufficient to establish liability under Section 1983. Mendenhall's Section 1983 claims against Goldsmith and the City of Indianapolis cannot be required to be plead more stringent than are other civil claims. *Leatherman, et al. v. Tarrant County, et al.*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1993).

"Municipalities do not enjoy immunity from suit – either absolute or qualified – under Section 1983." A municipality may be held liable if the "municipal policy or custom caused the constitutional injury." *Leatherman*, 61 Law Week 4205, at 4207, reviewing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978): "In short, a municipality can be sued under Section 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury." The municipal policy of the City of Indianapolis caused the constitutional injury to Mendenhall and violated his constitutional Fourth Amendment, made applicable to the States by the Fourteenth Amendment, Section 1983 rights. "A seizure of property, we have explained, occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County Illinois*, 61 Law Week 21, 4019, at 4020 (1992) Seizures of private property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. (*Soldal*, p. 4022)

Municipal liability may be imposed under Section 1983 for a single decision by municipal policymakers under appropriate circumstances. "If the decision to

adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Pembaur v. City of Cincinnati* 475 U.S. 469, at 481, (1986).

* * *

Reply Brief of Appellant Mendenhall,
pp 17-18

* * *

V.

REPLY TO ISSUE OF MUNICIPAL POLICY OF CITY COUNTY

The City concedes that a single decision by a municipal policymaker can create municipal liability under 42 U.S.C. Section 1983, (City's Brief, p. 17), and that the "Mayor and the Chief of Police are the chief policymakers for the City of Indianapolis, and the Marion County Commissioners are the chief policymakers for Marion County." (City's Brief, p. 18). The City argues however that Prosecutor Goldsmith "has not been delegated authority to act for either of these two entities," and that the district court on such ground should be affirmed under *Jett v. Dallas Indep. School Dist.* ___ U.S. ___, 109 S.Ct. 2702 (1989). The Supreme Court in *Jett*, held that a municipality may *not* be held liable for its employees' violations of Section 1981 under a *respondeat superior* theory. (p. 2704), but remanded that case for a factual finding as to final policy making authority. Goldsmith's Issue 2,

" . . . whether the District Court correctly determine[d] that under Indiana law the duly elected Marion County Prosecutor is not a policymaker for the City," is not an issue but an argumentative denial of the Complaint.

Whether Goldsmith was a separately elected official of the State of Indiana (under Ind. Const. Art. 7 Section, Ind. Code Section 33-14-1-3 and 4); or whether Goldsmith was a "persuasive prosecutor", (City Brief, p. 17), or whether he was "clearly acting as an arm of the State of Indiana in his prosecutorial capacity" (City Brief, p. 16), Goldsmith received part of his pay from Marion County, and from the City of Indianapolis (App. pp. A-183-191); and at all times acted under color of state law. Goldsmith collaborated with the policymakers of the City of Indianapolis to violate Mendenhall's civil rights as alleged. The City and the Prosecutor, both acting under color of state law, deprived Plaintiffs of their property, and in so doing, violated federal civil rights cognizable by the Fourth Amendment against unreasonable search and *seizure*, and the Fifth Amendment against taking of private property *without due process of law.*

Schrob v. Catterson, 948 F.2d 1402 (3rd Cir. 1991), (City's Brief, p. 11), dealt with absolute immunity of Prosecutors in a *criminal* case seeking search or arrest warrants. That Court had never considered prosecutorial immunity in the context of a civil forfeiture. (*Schrob,* p. 1414).

The City's collaboration with Prosecutor Goldsmith was to deny Plaintiffs' civil rights, and caused the constitutional injuries to Plaintiffs which are actionable Section 1983 claims by Plaintiffs under *Monell v. New York City*

Dept. of Social Services, 436 U.S. 658 (1978), and *Soldal v. Cook County Illinois*, 61 Law Week 21, 4019, 4020, (1992) (Mendenhall Brief, pages 23-24)

* * *

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INDIANA CODE

§ 35-45-6-2(a):

A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony.

§ 34-4-30.5-3:

(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. . . .

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have the property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.